Customs Bulletin

Regulations, Rulings, Decisions, and Notices concerning Customs and related matters

and Decisions

of the United States Court of Customs and Patent Appeals and the United States Customs Court

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THE DEPARTMENT OF THE TREASURY
U.S. Customs Service

NOTICE

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U.S. Customs Service

Treasury Decisions

(T.D. 79-303)

Synopses of Drawback Decisions

The following are synopses of drawback rates issued July 5, 1979, to November 7, 1979, inclusive, pursuant to section 22.1 and 22.5, inclusive, Customs Regulations; and approval under section 22.6, Customs Regulations.

In the synopses below are listed, for each drawback rate approved under section 1313(b), the name of the company, the specified articles on which drawback is authorized, the merchandise which will be used to manufacture or produce these articles, the factories where the work will be accomplished, the date the statement was signed, the basis for determining payment, the Regional Commissioner to whom the rate was forwarded to or issued by, and the date on which it was forwarded or issued.

(DRA-1-09)

Dated: November 27, 1979.

DONALD W. LEWIS,
Director, Office of Regulations and Rulings.

(A) Company: Del Monte Corp., a wholly owned subsidiary of R. J. Reynolds Industries, Inc.
Articles: Metal containers (cans).
Merchandise: Electrolytic tin plate in coils or sheets.
Factories: Rochelle, Ill.; Toppenish, Wash.; Smithfield, Utah; Oakland and Sacramento, Calif.; Crystal City, Tex.; Swedesboro, N.J.; Salem, Oreg.; Tampa, Fla.; Plover, Wis.
Statement signed: July 20, 1979.
Basis of claim: Appearing in.
Rate issued by Regional Commissioner of Customs in accordance with section 22.4(o)(2): San Francisco, September 25, 1979.
Revokes: T.D. 56215-H, as amended by 56500-D, 68-7-E, 69-111-H, and 69-240-I, to cover successorship from Del Monte Corp.

(B) Company: Del Monte Corp., a wholly owned subsidary of R. J. Reynolds Industries, Inc.
Articles: Canned fruits, fruit juices, and nectars.
Merchandise: Hard and liquid refined sugar.
Factories: Modesto, San Jose, Sacramento, Yuba City, Kingsburg, Stockton, Emeryville, Oakland, and Fresno, Calif.; Honolulu, Hawaii; Plover, Arlington, Markesan, Wis.; Frankfort, Ind.; Rochelle, De Kalb, and Mendota, Ill.; Sleepy Eye, and Wells, Minn.; Tampa, Fla.; Toppenish, Yakima, and Vancouver, Wash.; Salem, Oreg.; Franklin, and Burley, Idaho; Smithfield, Utah; Crystal City, Tex.
Statement signed: July 20, 1979.
Basis of claim: Used in.
Rate issued by Regional Commissioner of Customs in accordance with section 22.4(o)(2): San Francisco, October 1, 1979.
Revokes: T.D. 52207–B, as amended by 52679–D, 68–7–G, 69–111–J, and 69–240–N to cover successorship from Del Monte Corp.

(C) Company: Del Monte Corp., a wholly owned subsidiary of R. J. Reynolds Industries, Inc.
Articles: Puddings, fruit desserts (flummery), and fruits in gel.
Merchandise: Liquid and hard refined sugar.
Factories: Stockton and Emeryville, Calif.; Rochelle, Ill.
Statement signed: July 20, 1979.
Basis of claim: Appearing in.
Rate issued by Regional Commissioner of Customs in accordance with section 22.4(o)(2): San Francisco, October 9, 1979.
Revokes: T.D. 73–88–T, to cover successorship from Del Monte Corp.

(D) Company: General Electric Co., Television Business Department.
Articles: Television receivers.
Merchandise: Various components and subassemblies.
Factory: Suffolk, Va.
Statement signed: September 10, 1979.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: Baltimore, September 25, 1979.

(E) Company: Henkel Corp.
Articles: Polyamide resins.
Merchandise: Organic chemicals, intermediate products, and other raw materials.

Factories: Kankakee, Ill.; Minneapolis, Minn.
Statement signed: August 20, 1979.
Basis of claim: Used in, with distribution to the products obtained in accordance with their relative value at the time of separation.
Rate issued by Regional Commissioner of Customs in accordance with section 22.4(o)(2): Chicago, October 4, 1979.
Revokes: T.D. 77–76–K, to cover successorship from General Mills Chemicals, Inc.

(F) Company: Holly Sugar Corp.
Articles: Animal feed.
Merchandise: Molasses.
Factories: Tracy, Brawley, Santa Ana, and Hamilton City, Calif; Herford, Tex; Torrington and Worland, Wyo; Sidney, Mont.
Statement signed: May 21, 1979.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: San Francisco, October 1, 1979.

(G) Company: Laidlaw Corp.
Articles: Wire coathangers, coathanger wire.
Merchandise: Hot-rolled steel rods.
Factories: Metropolis, Ill; Monticello, Wis; New Castle, Del; Stockton, Calif.
Statement signed: August 26, 1979.
Basis of claim: Used in.
Rate forwarded to Regional Commissioners of Customs: San Francisco, and Chicago, October 1, 1979.

(H) Company: Minnesota Mining & Manufacturing Co.
Articles: Herbicides and plant growth regulators.
Merchandise: 4-acetamido-6-amino-1, 3 xylene.
Factory: Cordova, Ill.
Statement signed: May 18, 1979.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: New Orleans, October 1, 1979.

(I) Company: Olin Corp., Brass Group, Somers Thin Strip.
Articles: Thin-gage, stainless steel, and nickel/nickel alloy strip in coil form.
Merchandise: Stainless steel sheet and strip in coils; nickel alloy sheet and strip in coils.
Factory: Waterbury, Conn.

Statement signed: March 9, 1979.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: New York, October 4, 1979.

(J) Company: Pepsi-Cola Metropolitan Bottling Co., Inc. d.b.a. Pepsi-Cola Bottling Group.
Articles: Canned and bottled carbonated and noncarbonated beverages.
Merchandise: Hard and liquid refined sugar, liquid refined invert sugar.
Factory: Long Island City, N.Y.
Statement signed: July 3, 1979.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: New York, September 25, 1979.

(K) Company: Rohm & Haas Delaware Valley Inc.
Articles: Surfactants.
Merchandise: Triglycol dichloride.
Factory: Philadelphia, Pa.
Statement signed: April 18, 1979.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: Baltimore, July 5, 1979.
Revokes: Section No. 40, T.D. 78–397–U.

(L) Company: Rohm & Haas Delaware Valley Inc.
Articles: Stam series.
Merchandise: Diethanolamine.
Factory: Philadelphia, Pa.
Statement signed: May 11, 1979.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: Baltimore, July 13, 1979.
Revokes: Section No. 41, T.D. 78–397–U.

(M) Company: Rohm & Haas Delaware Valley Inc.
Articles: Orthochrom (clear, dull, lite, lustrone), and lacquer emulsions, and hydrholac products.
Merchandise: N-butyl acetate.
Factory: Philadelphia, Pa.
Statement signed: May 11, 1979.
Basis of claim: Used in.

Rate forwarded to Regional Commission of Customs: Baltimore, July 12, 1979.
Revokes: Section No. 42, T.D. 78–397–U

(N) Company: Rohm & Haas Delaware Valley Inc.
Articles: Dikar series.
Merchandise: Maleic acid.
Factory: Philadelphia, Pa.
Statement signed: April 18, 1979.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: Baltimore, July 17, 1979.
Revokes: Section No. 44, T.D. 78–397–U.

(O) Company: Rohm & Haas Delaware Valley Inc.
Articles: Acryloid solution coatings.
Merchandise: Ethyl methacrylate.
Factory: Bristol, Pa.
Statement signed: April 18, 1979.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: Baltimore, July 13, 1979.
Revokes: Section No. 45, T.D. 78–397–U.

(P) Company: Rohm & Haas Delaware Valley Inc.
Articles: Ion-exchange resins.
Merchandise: Lauryl chloride.
Factory: Philadelphia, Pa.
Statement signed: April 18, 1979.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: Baltimore, July 13, 1979.
Revokes: Section 47, T.D. 78–397–U.

(Q) Company: Rohm & Haas Delaware Valley Inc.
Articles: Dithane and Dikar.
Merchandise: Hexamethylenetetramine.
Factory: Philadelphia, Pa.
Statement signed: May 11, 1979.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: Baltimore, July 23, 1979.
Revokes: Section No. 48, T.D. 78–397–U.

(R) Company: Rohm & Haas Delaware Valley Inc.
Articles: Oil additives (VI improvers).
Merchandise: Isodecyl methacrylate.
Factory: Bristol, Pa.
Statement signed: April 18, 1979.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: Baltimore, July 16, 1979.
Revokes: Section No. 50, T.D. 78–397–U.

(S) Company: Rohm & Haas Delaware Valley Inc.
Articles: Monoplex resins series, Karathane series, surfactants, Triton GR–5M, and Triton GR–7M.
Merchandise: 2 ethyl hexanol.
Factory: Philadelphia, Pa.
Statement signed: May 11, 1979.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: Baltimore, July 16, 1979.
Revokes: Section No. 51, T.D. 78–397–U.

(T) Company: Rohm & Haas Delaware Valley Inc.
Articles: GEL anionic, ion-exchange resins, acrylic, anion, ion-exchange resins, and mixed ion-exchange resins.
Merchandise: Diethylene triamine.
Factory: Philadelphia, Pa.
Statement signed: April 18, 1979.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: Baltimore, July 16, 1979.
Revokes: Section No. 52, T.D. 78–397–U.

(U) Company: Rohm & Haas Delaware Valley Inc.
Articles: Acryloid modifiers, emulsions (Rhoplex and Primal), emulsions (Acrysol and Rhotex), acryloid solution and solid coatings, dispersants, and orthochrom.
Merchandise: Glacial methacrylic acid.
Factory: Bristol, Pa.
Statement signed: April 18, 1979.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: Baltimore, July 16, 1979.
Revokes: Section No. 53, T.D. 78–397–U.

(V) Company: Rohtstein Corp.
Articles: Sugar packets.
Merchandise: Refined sugar.
Factory: Woburn, Mass.
Statement signed: June 26, 1979.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: Boston, September 25, 1979.

(W) Company: Shugart Associates, a subsidiary of Xerox Corp.
Articles: Disc drives.
Merchandise: Electric motors: synchronous, permanent, split-capacitor.
Factory: Sunnyvale, Calif.
Statement signed: July 16, 1979.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: San Francisco, October 11, 1979.

(X) Company: Thermark, an Avery International Co.
Articles: Coated polyester film (hot-stamp tape).
Merchandise: Polyester film.
Factory: Schererville, Ind.
Statement signed: July 19, 1979.
Basis of claim: Appearing in.
Rate forwarded to Regional Commissioner of Customs: New York, October 4, 1979.

(Y) Company: The Upjohn Co., Fine Chemical Division.
Articles: Para toluene sulfonyl isocyanate.
Merchandise: Para toluene sulfonamide.
Factory: North Haven, Conn.
Statement signed: June 5, 1979.
Basis of claim: Used in.
Rate forwarded to Regional Commissioner of Customs: New York, September 27, 1979.

(Z) Company: Vernell's Fine Candies.
Articles: Confectionery.
Merchandise: Hard refined sugar.
Factories: Seattle and Bellevue, Wash.
Statement signed: September 17, 1979.
Basis of claim: Appearing in.
Rate issued by Regional Commissioner of Customs in accordance with section 22.4(o)(2): San Francisco, October 17, 1979.
Revokes: T.D. 79–155–Y.

Approval Under Section 22.6, Customs Regulations

(1) Company: Holly Sugar Corp.
Articles: Hard refined sugar, liquid sugar, liquid invert sugar, molasses, and sugar contained in animal feed.
Merchandise: Raw sucrose.
Factories: Tracy, Brawley, Santa Ana and Hamilton City, Calif.; Hereford, Tex.; Torrington and Worland, Wyo.; Sidney, Mont.
Statement signed: October 25, 1979
Basis of claim: Used in.
Rate issued by Regional Commissioner of Customs in accordance with section 22.4(o)(1): San Francisco, November 7, 1979.
Revokes: T.D. 79-230(2).

(T.D. 79-304)

Special Tonnage Tax and Light Money—Customs Regulations Amended

Foreign discriminating duties of tonnage and impost with respect to vessels of and certain imports from the Bahamas suspended and discontinued; section 4.22, Customs Regulations, amended

TITLE 19—CUSTOMS DUTIES

CHAPTER I—U.S. CUSTOMS SERVICE

PART 4—VESSELS IN FOREIGN AND DOMESTIC TRADES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule.

SUMMARY: This document adds the Bahamas to the lists of nations whose vessels are exempted from the payment of higher tonnage duties than are applicable to vessels of the United States and from the payment of light money. Satisfactory evidence has been obtained by the Department of State that no discriminating duties of tonnage or impost are imposed in parts of the Bahamas upon vessels belonging to citizens of the United States or on their cargoes.

EFFECTIVE DATE: The exemption became effective February 9, 1979.

FOR FURTHER INFORMATION CONTACT: Donald H. Reusch, Carriers, Drawback and Bonds Division, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229; 202-566-5706.

SUPPLEMENTARY INFORMATION:

BACKGROUND

Generally, the United States imposes regular and special tonnage taxes, and a duty of a specified amount per ton, known as "light money," on all foreign vessels which enter U.S. ports (46 U.S.C. 121, 128). However, vessels of a foreign nation may be exempted from the payment of special tonnage taxes and light money upon presentation of proof satisfactory to the President that no discriminating duties of tonnage or imposts are imposed by that foreign nation on U.S. vessels or their cargoes (46 U.S.C. 141). The President has delegated the authority to grant this exemption to the Secretary of the Treasury. Section 4.22, Customs Regulations (19 CFR 4.22), lists those nations whose vessels have been exempted from the payment of any higher tonnage duties than are applicable to vessels of the United States and from the payment of light money.

On June 25, 1979, the Department of State advised the Treasury Department that on February 9, 1979, the Government of the Bahamas gave assurances to the U.S. Embassy in Nassau that no discriminating duties of tonnage or imposts are imposed or levied in the ports of the Bahamas upon vessels wholly belonging to citizens of the United States, or upon the produce, manufactures, or merchandise imported from the United States or from any foreign country in vessels of the United States. Consequently, there is satisfactory evidence which would permit the Secretary of the Treasury to find that vessels of the Bahamas are entitled to the exemption, and the Department of State has requested that such vessels be afforded the exemption.

DECLARATION

Therefore, by virtue of the authority vested in the President by section 4228 of the revised statutes, as amended (46 U.S.C. 141), and delegated to the Secretary of the Treasury by Executive Order No. 10289, September 17, 1951, as amended by Executive Order No. 10882, July 18, 1960 (3 CFR, 1959–1963 Comp., ch. II) and pursuant to the authorization provided by Treasury Department Order No. 101–5 (44 F.R. 31057), I declare that the foreign discriminating duties of tonnage and impost within the United States are suspended and discontinued, in respect to vessels of the Bahamas and the produce, manufactures, or merchandise imported into the United States in such vessels from the Bahamas or from any other foreign country.

This suspension and discontinuance shall extend retroactively to February 9, 1979, in respect to vessels of the Bahamas and shall continue only for so long as the reciprocal exemptions of vessels wholly

belonging to citizens of the United States and their cargoes shall be continued.

AMENDMENT TO THE REGULATIONS

In accordance with this declaration, section 4.22, Customs Regulations (19 CFR 4.22), is amended by adding "Bahamas, The" in the appropriate alphabetical sequence in the list of nations whose vessels are exempted from the payment of any higher tonnage duties than are applicable to vessels of the United States and from the payment of light money.

(R.S. 251, as amended, 4219, as amended, 4225, as amended, 4228, as amended, sec. 3, 23 Stat. 119, as amended, sec. 624, 46 Stat. 759 (19 U.S.C. 66, 1624, 46 U.S.C. 3, 121, 128, 141).)

INAPPLICABILITY OF PUBLIC NOTICE AND DELAYED EFFECTIVE DATE REQUIREMENTS

Because this is a minor amendment in which the public does not have a particular interest and, which merely implements a statutory requirement, notice and public procedure pursuant to 5 U.S.C. 553(b)(B) are unnecessary. In accordance with 5 U.S.C. 553(d), a delayed effective date is not required because this amendment grants an exemption.

REGULATION DETERMINED TO BE NONSIGNIFICANT

In a directive published in the Federal Register on November 8, 1978 (43 F.R. 52120), implementing Executive Order 12044, "Improving Government Regulations," the Treasury Department stated that it considers each regulation or amendment to an existing regulation published in the Federal Register and codified in the Code of Federal Regulations to be "significant." However, regulations which are nonsubstantive, essentially procedural, do not materially change existing or establish new policy, and do not impose substantial additional requirements or costs on, or substantially alter the legal rights or obligations of, those affected, with secretarial approval, may be determined not to be significant. Accordingly, it has been determined that this amendment does not meet the Treasury Department criteria in the directive for "significant" regulations.

DRAFTING INFORMATION

The principal author of this document was Charles W. Hart, Office of Regulations and Rulings, U.S. Customs Service. However, personnel from other Customs offices and the Departments of State and Treasury participated in its development.

Dated: November 8, 1979.

RICHARD J. DAVIS,
Assistant Secretary of the Treasury.

[Published in the Federal Register, Dec. 7, 1979 (44 F.R. 70458)]

(T.D. 79-305)

Public Law 95-410—Customs Regulations Amended

Part 171, Customs Regulations, relating to fines, penalties, and forfeitures; amended

TITLE 19—CUSTOMS DUTIES

CHAPTER I—U.S. CUSTOMS SERVICE

PART 171—FINES, PENALTIES, AND FORFEITURES

AGENCY: U.S. Customs Service, Department of the Treasury.

ACTION: Final rule correction.

SUMMARY: This document corrects an omission from T.D. 79-160 which amended the Customs Regulations implementing various aspects of Public Law 95-410, the "Customs Procedural Reform and Simplification Act of 1978," relating to fines, penalties, forfeitures, and liquidated damages incurred for violations of Customs and navigation laws.

EFFECTIVE DATE: (Upon publication in the Federal Register.)

FOR FURTHER INFORMATION CONTACT: Edward T. Rosse, Commercial Fraud and Negligence Branch, Office of Regulations and Rulings, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229; 202-566-8317.

SUPPLEMENTARY INFORMATION:

BACKGROUND

The Customs Procedural Reform and Simplification Act of 1978, (Public Law 95-410), approved October 3, 1978, made numerous amendments to statutes administered by Customs which relate to fines, penalties, forfeitures, and liquidated damages for violations of Customs and navigation laws. Final amendments to the Customs Regulations implementing these changes were published as T.D. 79-160 in the Federal Register on June 4, 1979 (44 F.R. 31950).

On page 31955 of the document, under the heading "Editorial changes," an explanation was provided for certain changes which had been made from the regulations proposed in a notice published in the Federal Register on November 16, 1978 (43 F.R. 53453). Item 3 under that heading discussed a change to section 171.14(b) Customs Regulations (19 CFR 171.14(b)) relating to the right of a person named in a penalty notice to make an oral presentation seeking relief from a penalty incurred for a violation of section 592, Tariff Act of 1930, as amended (19 U.S.C. 1592). The document stated that the language

after "in the discretion of" in proposed section 171.14(b) has been deleted and the following substituted:

> * * * any official of the Customs Service or Department of the Treasury authorized to act on a petition or supplemental petition.

The document also stated that the change was made because various officials within Customs and the Treasury Department other than those specifically enumerated in the proposed section are authorized to act on petitions and supplemental petitions. However, the above change was not made in the text of the amendments. Accordingly, the following amendment is made to the Customs Regulations to reflect this change.

INAPPLICABILITY OF NOTICE AND DELAYED EFFECTIVE DATE PROCEDURES

Because this amendment is designed merely to correct an omission from a previously published amendment to the Customs Regulations, good cause is found for dispensing with the notice and delayed effective date provisions of 5 U.S.C. 552.

INAPPLICABILITY OF EXECUTIVE ORDER 12044

This document is not subject to the provisions of the Treasury Department directive (43 F.R. 52120) implementing Executive Order 12044, "Improving Government Regulations," because the document to which this correction relates was in the process of preparation before May 22, 1978, the effective date of the directive.

DRAFTING INFORMATION

The principal author of this document was John E. Elkins, Regulations and Research Division, U.S. Customs Service. However, personnel from other Customs offices participated in its development.

AMENDMENT TO THE REGULATIONS

Section 171.14(b), Customs Regulations (19 CFR 171.14(b)), is amended to read as follows:

PART 171—FINES, PENALTIES, AND FORFEITURES

171.14 Oral presentations seeking relief.

* * * * * * *

(b) *Other oral presentations.*—Oral presentations other than those provided in paragraph (a) of this section may be allowed in the discretion of any official of the Customs Service or Department of the Treasury authorized to act on a petition or supplemental petition.

(R.S. 251, as amended (19 U.S.C. 66), section 592, 46 Stat. 570, as

amended (19 U.S.C. 1592), section 27, 41 Stat. 99, as amended (46 U.S.C. 883).)

JACK T. LACY,
Acting Commissioner of Customs.

Approved: November 16, 1979.
RICHARD J. DAVIS,
Assistant Secretary of the Treasury.

[Published in the Federal Register, Dec. 12, 1979 (44 F.R. 70459)]

(T.D. 79-306)

Rules of the U.S. Customs Court

Amendments to the rules of the U.S. Customs Court; effective January 1, 1980

There is published for information and guidance an amendment to the rules of the U.S. Customs Court which are effective January 1, 1980.

The court rules were heretofore published in T.D. 70-180 of August 20, 1970, and amendments were published in T.D. 70-260, T.D. 72-126, T.D. 73-193, T.D. 74-148, T.D. 75-25, T.D. 75-189, T.D. 76-35, T.D. 77-187, and T.D. 77-248.

Dated: December 3, 1979

WILLIAM T. ARCHEY,
Acting Commissioner of Customs.

RULES OF THE UNITED STATES CUSTOMS COURT

STATEMENT OF THE COURT IN ADOPTING AMENDMENTS AND ADDITIONS TO THE RULES

That the following amendments and additions to the Rules of the United States Customs Court shall take effect on January 1, 1980, and shall govern all proceedings in actions brought thereafter. They shall also govern all further proceedings in actions then pending, except to the extent that in the opinion of the court their application in a particular action then pending would not be feasible or would work injustice, in which event the former procedure applies.

In addition, whenever a party is required or has been requested prior to the effective date of the following amendments and additions to perform an act, pursuant to the rules of this court in effect prior to January 1, 1980, the act may still be performed in accordance with the rules in effect prior to January 1, 1980.

RULES OF THE UNITED STATES CUSTOMS COURT

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Chapter 2. The Court

RULE 2.1 THE COURT NAME, SEAL, TERM; EMERGENCY MATTERS

* * * * * * *

(c) **Court Term:** The court shall be in continuous session for transacting judicial business on all business days throughout the year.

(d) **Emergency Matters:** Emergency matters may be presented to and heard by the court at any time.

* * * * * * *

RULE 2.3 ASSIGNMENT OF ACTIONS

(a) **Assignment:** Actions Shall Be Assigned by the Chief Judge as Follows:

(1) Upon notice of trial or dispositive motion in an action commenced under 28 U.S.C. § 1582 (a) and (b) (except actions commenced pursuant to section 516A of the Tariff Act of 1930);

(2) Upon joinder of issue or dispositive motion in all other actions; **or**

(3) At any time, in any action, upon motion of a party for good cause shown, or upon his own initiative.

* * * * * * *

Chapter 3. Commencement of Action; Summons; Summons and Complaint; Computation of Time

RULE 3.1 FORMS OF ACTION

(a) **Civil Action:** An action which is commenced in the United States Customs Court shall be known as a civil action except for those actions covered by paragraph (b) of this rule.

(b) **Designation of Certain Pre-October 1, 1970 Actions:** The following designations shall apply to actions arising prior to October 1, 1970:

(1) **Appeal for Reappraisement:** An action arising pursuant to section 501 or 516(a) of the Tariff Act of 1930, as effective prior to October 1, 1970, and forwarded to the court pursuant to section 501 or 516(c) of said Act, shall be known as an appeal for reappraisement.

(2) **Protest:** An action arising pursuant to section 514 or 516(b) of the Tariff Act of 1930, as effective prior to October 1, 1970, and forwarded to the court pursuant to section 515 or 516(c) of said Act, shall be know as a protest.

[Rule 3.1(c) deleted; content incorporated above.]

RULE 3.2 COMMENCEMENT OF ACTION

(a) **Summons; Summons and Complaint: Filing; Fee:** A civil action is commenced in the United States Customs Court as follows:

(1) In an action under 28 U.S.C. § 1582 (a) and (b) (except actions commenced pursuant to section 516A of the Tariff Act of 1930), upon the filing of a summons in the form described in Appendix A or Appendix B–1.

(2) In an action under section 516A(a)(2) of the Tariff Act of 1930, upon the filing of a summons in the form described in Appendix B–2.

(3) In all other actions, by filing concurrently a summons in the form described in Appendix B–2 and a complaint.

In all actions, a filing fee of $5 shall be paid in the manner prescribed by the clerk. In addition, a completed Information Statement, on a form to be furnished by the clerk, shall be filed.

(b) **Summons; Summons and Complaint: Filing by Mail; Date of Filing:** For purposes of commencement of an action, a summons, or summons and complaint, sent by registered or certified mail properly addressed to the clerk of the court at One Federal Plaza, New York, New York 10007, with the proper postage affixed and return receipt requested, shall be deemed filed as of the date of postmark.

(c) **Summons; Summons and Complaint: By Whom Filed:** In an action commenced by an individual on his own behalf, a summons, or summons and complaint, may be filed by such individual, or by an attorney admitted to practice before this court. In any other action, a summons, or summons and complaint, may be filed only by an attorney admitted to practice before this court.

(d) **Summons; Summons and Complaint: Number of Copies:**

* * * * * * *

(3) An original and 3 copies of the summons, or summons and complaint when filed concurrently, shall be filed with the clerk in all other actions: *Provided*, That when the action involves more than one defendant, an additional copy of the summons shall be filed for each additional defendant, and, when the action is commenced by the filing of a summons and complaint concurrently, an additional copy of the complaint shall also be filed for each additional defendant, except when the plaintiff serves the complaint pursuant to Rule 3.2(g)(4).

(e) **Summons; Summons and Complaint: Date of Filing; Motion To Correct:**

(1) The records of the clerk, including the date of filing stamped on the summons, or summons and complaint, or when sent by registered or certified mail, the date of postmark shall be final and conclusive evidence of the date on which a summons, or summons and complaint, was filed unless a motion to correct the record is made and granted pursuant to subparagraph (2) of this paragraph (e).

(2) A party who contends that the effective filing date of a summons, or summons and complaint, should be a date other than the

date shown in the records of the clerk may seek a corrective order by motion made pursuant to Rule 4.12, and the court may, upon satisfactory proof that the records of the clerk with respect to the filing date were incorrect, order the record corrected.

(f) **Amendment:** At any time in its discretion, and upon such terms as it deems just, unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the amendment is allowed, the court may: (1) allow any summons, or proof of service thereof, to be amended, or (2) allow amendment of proof of service of the complaint.

(g) **Summons; Summons Filed Concurrently With Complaint:** Service by Clerk or Plaintiff: Upon filing of a summons, or a summons filed concurrently with a complaint, the summons shall be issued in the name of the clerk under the seal of the court. The clerk shall return a copy of the summons, together with a receipt for payment of the filing fee, to the person who filed the summons, or summons and complaint, and shall make service of the summons, or summons and complaint, as prescribed by this rule:

(1) When a civil action is commenced under 28 U.S.C. § 1582 (a) and (b) (except an action commenced pursuant to section 516A of the Tariff Act of 1930), the clerk shall make service of the summons: upon the Attorney General, by delivery or by mailing a copy to the Attorney in Charge, Field Office for Customs Litigation, Department of Justice; and upon the Secretary of the Treasury, by delivery or by mailing a copy to the Assistant Chief Counsel for Customs Litigation, United States Customs Service, and by delivery or by mailing a copy to the district director for the customs district in which the protest was denied, or, in which the liquidation of an entry is contested under section 516(c) of the Tariff Act of 1930.

(2) When a civil action is commenced to contest a decision of the Secretary of the Treasury under section 516(c) of the Tariff Act of 1930, the clerk shall make service by delivery or by mailing a copy of the summons to the parties specified in subparagraph (1) of this paragraph (g) and to the consignee or agent of the consignee involved in each entry which is the subject of the civil action.

(3) When a civil action is commenced under 28 U.S.C. § 1582 (e) and (f), or under section 516A of the Tariff Act of 1930, the clerk shall make service of the summons, or summons and complaint when filed concurrently, upon the Attorney General as provided in subparagraph (1) of this paragraph (g) and upon the heads of the government agencies whose determinations are the subject of the action.

When the head of an agency or a named official is to be served, service shall be made by the clerk by mailing a copy of the summons

or summons and complaint when filed concurrently, by registered or certified mail to the agency or official.

(4) Service of Summons and Complaint by Plaintiff in Section 516A(a)(1) Action: Instead of service of the summons and complaint by the clerk, in an action commenced pursuant to section 516A(a)(1) of the Tariff Act of 1930, plaintiff may obtain a court number from the clerk and serve a copy of the summons and complaint in accordance with subparagraph (3) of this paragraph (g). Plaintiff shall forthwith file the original summons and complaint, together with an affidavit of service, with the clerk of the court.

[Rules 3.2 (h) and (i) deleted; see new CHAPTER 5. DOCUMENTS.]

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RULE 3.5 SUMMONS BY DOMESTIC INTERESTED PARTIES: FORM AND CONTENT

* * * * * * *

[No language change in Rules 3.5 (a), (b), and (c). Rules 3.5 (d) and (e) deleted; content incorporated in Rule 3.6 below.]

[RULE 3.6 TIME—redesignated as RULE 3.7.]

RULE 3.6 SUMMONS IN ALL OTHER ACTIONS: FORM AND CONTENT

Form and Content of Summons in All Other Civil Actions: A summons in all other civil actions shall be substantially in the form as set forth in Appendix B–2, and shall set forth:

(1) The name and standing of the plaintiff;

(2) A brief description of the contested determination;

(3) The date of such determination;

(4) If applicable, the date of publication in the Federal Register of notice of the contested determination; and

(5) The name, signature, post office address and telephone number of the attorney filing the summons or of the individual filing the summons in his own behalf.

RULE 3.7 TIME

[Only change is redesignation from Rule 3.6 to Rule 3.7; language remains identical.]

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Chapter 4. Pleadings; Motions

RULE 4.1 SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(a) **Service:** * * *

* * * * * * *

(4) Upon the United States, by delivery or by mailing a copy to the office of the Assistant Attorney General of the United States, Attorney in Charge, Field Office for Customs Litigation, 26 Federal Plaza, New York, New York 10007.

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RULE 4.4 PLEADINGS

(a) **Filing of Complaint and Answer in a Civil Action Commenced Under 28 U.S.C. § 1582 (a) and (b) (Except Actions Commenced Under Section 516A of the Tariff Act of 1930):** A plaintiff who desires to try or otherwise prosecute an action commenced under 28 U.S.C. § 1582 (a) and (b) (except actions commenced under section 516A of the Tariff Act of 1930) shall serve upon the opposite party and file with the court a complaint to which an answer shall be filed.

(b) **Demand for a Complaint in a Civil Action Commenced Under 28 U.S.C. § 1582 (a) and (b) (Except Actions Commenced Under Section 516A of the Tariff Act of 1930):** A defendant who desires to have an action tried or otherwise prosecuted shall serve upon the opposite party and file with the court a demand for a complaint. Upon the service and filing of such demand, the plaintiff, in the absence of other disposition, shall serve upon the opposite party and file with the court a complaint within 30 days from the filing of such demand.

(c) **Filing of a Complaint in a Civil Action Commenced Under Section 516A(a)(1) of the Tariff Act of 1930:** In an action commenced under section 516A(a)(1) of the Tariff Act of 1930, a complaint shall be filed with the court concurrently with the summons.

(d) **Filing of a Complaint in a Civil Action Commenced Under Section 516A(a)(2) of the Tariff Act of 1930:** In an action commenced under section 516A(a)(2) of the Tariff Act of 1930, a complaint shall be filed with the court within 30 days after the filing of the summons.

(e) **Replies to Answers:** There shall be a reply to an alternative claim or an affirmative defense denominated as such contained in an answer. No other pleading shall be allowed except that the court may order a reply to an answer.

RULE 4.5 CONTENT OF COMPLAINT IN A CIVIL ACTION COMMENCED PURSUANT TO 28 U.S.C. § 1582 (a) AND (b) (EXCEPT ACTIONS COMMENCED PURSUANT TO SECTION 516A OF THE TARIFF ACT OF 1930)

(a) **General:** The complaint in a civil action shall set forth:

(1) A statement of the plaintiff's standing in the action;

(2) A statement that the protest was timely filed, and in the case of a protest filed by a surety, a statement that the protest certified that it was not filed collusively to extend another authorized person's time to protest;

(3) A statement, when appropriate, that all liquidated duties have been paid;

(4) A description of the merchandise involved;

(5) A specification of the contested customs decision or decisions; and

(6) A demand for judgment for the relief to which plaintiff deems himself entitled.

* * * * * * *

RULE 4.5C CONTENT OF COMPLAINT IN A CIVIL ACTION COMMENCED PURSUANT TO SECTION 516A OF THE TARIFF ACT OF 1930

Complaint: Form and Content: A complaint in a civil action commenced pursuant to section 516A of the Tariff Act of 1930 shall set forth:

(1) A short and plain statement of the grounds upon which the court's jurisdiction depends;

(2) A short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) A demand for judgment for the relief to which the pleader deems itself entitled. Relief in the alternative or of several different types may be demanded.

* * * * * * *

RULE 4.7 DEFENSES AND OBJECTIONS: WHEN AND HOW PRESENTED

(a) **Time for Answer and Reply:**

(1) In a civil action contesting a determination listed in section 516A(a)(1) of the Tariff Act of 1930, or a final determination under section 305(b)(1) of the Trade Agreements Act of 1979, the defendant shall file its answer within 30 days after the service of the complaint.

(2) In a civil action seeking an order making confidential information available pursuant to section 777(c)(2) of the Tariff Act of 1930, the defendant shall file its answer within 5 days of service of the summons and complaint.

(3) In all other civil actions, except as otherwise provided in these rules, a defendant shall serve its answer within 60 days after the service of the complaint.

(4) When a reply to an answer is required or ordered, the reply shall be filed within the following period: (i) within 10 days in response to answers referred to in subparagraph (a)(1) above, (ii) within 3 days in response to answers referred to in subparagraph (a)(2) above, (iii) within 30 days in response to answers referred to in subparagraph (a)(3) above.

(5) If the court denies a motion permitted under this rule or postpones its disposition until the trial on the merits, the responsive pleading shall be served within 10 days after service by the clerk of the order of the court unless a different time is fixed by order of the court. *Provided*, however, That with respect to an action pursuant to section 777(c)(2) of the Tariff Act of 1930, the responsive pleading shall be served within 1 day after service by the clerk of the order of the court unless a different time is fixed by order of the court.

(6) If the court grants a motion for a more definite statement pursuant to paragraph (d) of this rule, the responsive pleading shall be served within 10 days after the service of the more definite statement unless a different time is fixed by order of the court. *Provided*, however,

That with respect to an action pursuant to section 777(c)(2) of the Tariff Act of 1930, the responsive pleading shall be served within 3 days after the service of the more definite statement unless a different time is fixed by order of the court.

* * * * * * *

RULE 4.11 SIGNING OF PAPERS

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(b) **The United States:** Every pleading or other paper of the United States shall be signed by an attorney authorized to do so in the Civil Division, on behalf of the Assistant Attorney General, Civil Division, Department of Justice.

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RULE 4.12 MOTION PRACTICE

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(c) **Time To Respond:**

(1) An objection or response to a contested motion, other than one described in subparagraph (2) of this paragraph (c), shall be filed within 10 days after service of such motion, except that an objection or response to a dispositive motion, i.e., a motion to dismiss the action, a motion for judgment on the pleadings, and a motion for summary judgment, shall be filed within 30 days after service of such motion. On a dispositive motion, the moving party shall have 15 days from the date of service of the objections or response to file a reply.

(2) An objection or response to a contested motion for an order making confidential information available pursuant to section 777 (c)(2) of the Tariff Act of 1930 shall be filed within 5 days after service of such motion.

* * * * * * *

(e) **Order To Show Cause:** An order to show cause why the requested relief should not be allowed may be granted only upon a clear and specific showing, by affidavit, of good and sufficient reasons why procedure other than by regular motion is necessary or why the time to respond should be shortened.

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[CHAPTER 5. PARTIES—removed to new CHAPTER 18.]

Chapter 5. Documents

RULE 5.1 DOCUMENTS FURNISHED IN CIVIL ACTION

Documents Furnished in a Civil Action Commenced Under 28 U.S.C. § 1582 (a) and (b) (Except Actions Commenced Pursuant to Section 516A of the Tariff Act of 1930): Upon service of the summons on the appropriate district director, he shall, in accordance with 28

U.S.C. § 2632(f), forthwith transmit the following items, if they exist, to the court as part of the official record of the civil action:

(1) Consumption or other entry;
(2) Commercial invoice;
(3) Special customs invoice;
(4) Copy of protest;
(5) Copy of denial of protest in whole or in part;
(6) Importer's exhibits;
(7) Official samples;
(8) Any official laboratory reports; and
(9) The summary sheet.

If any of the aforesaid items do not exist in the particular action, an affirmative statement to that effect shall be transmitted as part of the official record.

RULE 5.2 DOCUMENTS FURNISHED AND FILING PROCEDURE IN CIVIL ACTIONS COMMENCED PURSUANT TO SECTIONS 516A AND 777(c)(2) OF THE TARIFF ACT OF 1930

(1) **Documents Furnished and Filing Procedure in an Action Under Section 516A of the Tariff Act of 1930:** In an action commenced under section 516A of the Tariff Act of 1930, within 40 days after the service of the summons upon the head of the agency whose determination or action is the subject of the civil action, he, or his designee, shall file the items contained in subparagraphs (1)(a) and (1)(b) below (unless the alternative Rule 5.2(2) is followed), if they exist, and the items contained in subparagraph (1)(c) below, with the clerk of the court as part of the official record of the civil action:

(a) A copy of all information presented to or obtained by the Secretary of the Treasury, the administering authority, the International Trade Commission or any other agency involved, during the course of the administrative proceedings, including all governmental memoranda pertinent to the case and the record of *ex parte* meetings required to be kept by section 777(a)(3)of the Tariff Act of 1930;

(b) A copy of the determination, all transcripts of records of conferences or hearings, and all notices published in the Federal Register; and

(c) A certified list of all items described in subparagraphs (1)(a) and (1)(b) above.

Any information deemed by the agency to be confidential or privileged shall be filed under seal with the clerk of the court.

(2) **Alternative to Rule 5.2(1):** Documents Furnished and Filing Procedure in an Action Under Section 516A of the Tariff Act of 1930: In an action commenced under section 516A of the Tariff Act of 1930:

(A) (i) Within 10 days after service of the summons upon the head of the agency whose determination or action is the subject of the civil

action, the agency may elect to file with the clerk of the court a certified list of all items described in subparagraphs (1) (a) and (1) (b) of this rule and shall forthwith serve such certified list upon the plaintiff; (ii) within 10 days after the filing of the certified list, the plaintiff shall either stipulate with the agency that the filing of the certified list alone shall constitute the record or shall designate those items contained in the certified list which it wishes to be filed with the clerk of the court. If the parties stipulate that the certified list alone shall constitute the record, the plaintiff shall forthwith file a copy of such agreement with the clerk of the court. If the plaintiff designates those items contained in the certified list which it wishes to be filed with the clerk of the court, the plaintiff shall serve such designation upon the head of the agency within 10 days after the filing of the certified list; (iii) within 10 days after the service of plaintiff's designation, the agency shall file the designated matters, as well as any other items from the certified list which the agency deems relevant, with the clerk of the court.

(B) The agency shall retain the remainder of the record. All parts of the record retained by the agency or commission shall be a part of the record on review for all purposes.

(C) Upon request to the agency or commission by a party, or by the court at any time, any part of the record retained by the agency shall be filed by the agency with the clerk of the court forthwith notwithstanding any prior stipulation or designations under subparagraph (2)(A).

(3) Documents Furnished and Filing Procedure in an Action Commenced Pursuant to Section 777(c)(2) of the Tariff Act of 1930: In an action commenced pursuant to section 777(c)(2) of the Tariff Act of 1930, within 5 days after the service of the summons and complaint upon the head of the agency whose action is the subject of the civil action, he, or his designee, shall file, under seal, the information deemed confidential by the agency, together with pertinent parts of the record, with the clerk of the court, as part of the official court record of the civil action.

(4) Documents Furnished: Copies: Certified copies of the original papers in the agency proceeding may be filed.

(5) Filing of the Record With the Clerk of the Court: What Constitutes: The filing of the record shall be in accordance with paragraph (1) above, unless the parties follow the alternative procedure for filing documents set out in paragraph (2) above. In the latter event, if the parties have designated only parts of the record for filing, or if the parties stipulate to the filing of only a certified list, the filing of the designated parts of the record or certified list shall constitute filing of the record.

(6) Documents Furnished: Time; Notice of Filing: Upon motion of a party for good cause shown, or upon its own motion, the court may shorten or extend the times for filing prescribed in paragraphs (1), (2), and (3) above.

The clerk shall give notice to all parties of the date on which the record is filed.

Chapter 6. Discovery

RULE 6.1 GENERAL PROVISIONS GOVERNING DISCOVERY

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(b) **Scope of Discovery:** Unless otherwise ordered by the court in accordance with these rules, the scope of discovery is as follows:

* * * * * * *

(2) Subject to the provisions of subparagraph (3) of this paragraph (b), a party may obtain discovery of documents and tangible things otherwise discoverable under subparagraph (1) of this paragraph (b) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. The provisions of Rule 6.5(a)(3) apply to the award of costs incurred in relation to the motion. If the request is refused, the person may move for a court order. For purposes of this paragraph, a statement previously made is (i) a written statement signed or otherwise adopted or approved by the person making it, or (ii) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(3) Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subparagraph (1) of this paragraph (b) and acquired or developed in anticipation of litigation for trial, may be obtained only as follows:

(A)(i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subparagraph (3)(C) of this paragraph (b) concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivision (3)(A)(ii) and subparagraph (3)(B) of this paragraph (b), and (ii) with respect to discovery obtained under subdivision (3)(A)(ii) of this paragraph (b) the court may require, and with respect to discovery obtained under subparagraph (3)(B) of this paragraph (b) the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(c) **Protective Orders:** * * *

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[No language change other than addition of following new paragraph.]

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 6.5(a)(3) apply to the award of costs incurred in relation to the motion.

(d) **Sequence and Timing of Discovery:** Unless the court, upon motion, for the convenience of parties and witnesses and in the interest of justice, orders otherwise, methods of discovery may be used in any sequence; and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery: *Provided,* That no discovery may be initiated prior to the filing of a complaint, or later than 90 days after issue is joined, without leave of court.

(e) **Supplementation of Responses:** A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (i) the identity and location of persons having knowledge of discoverable matters, and (ii) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (i) he knows that the response was incorrect when made, or (ii) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(f) **Discovery Conference:** At any time after the filing of a complaint the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon request by the attorney for any party if the request includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the request has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the request. Each party and his attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the request shall be served on all parties. Objections or additions to matters set forth in the request shall be served not later than 10 days after service of the request.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of costs, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly requests a discovery

conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 9.3.

RULE 6.2 REQUEST FOR ADMISSIONS

(a) **Scope and Content:** A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 6.1(b) set forth in the request that relate to statements or opinions of fact or of the application of law to fact including the genuineness of any documents described in the request. Copies of documents shall be served with the request unless they have been or are otherwise furnished or made available for inspection and copying. The request may, without leave of court, be served upon the plaintiff after filing of the complaint and upon any other party with or after service of the summons and complaint upon that party. Each matter of which an admission is requested shall be separately set forth.

(b) **Response to Request for Admissions:**

(1) Each matter as to which an admission is requested shall be deemed admitted unless, within 30 days after service of the request, or within such shorter or longer time as the court may allow, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by his attorney, but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon him.

(2) The reasons for each objection made shall be stated. The answer shall specifically admit or deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission. If a party must qualify his answer or can admit only a part, he shall specify so much of it as is admitted to be true and shall qualify or deny the remainder. Lack of knowledge or information shall not be given as a reason to fail to admit or deny unless the answering party states that he has made reasonable inquiry and that the information known or readily obtainable by him is insufficient to enable him to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request. He may, subject to the provisions of Rule 6.5(d), deny the matter or set forth reasons why he cannot admit or deny it.

Reasons for refusal to concede the genuineness of documents and objections to the admission of documents in evidence shall be stated in

such terms as to enable the party making the request for admissions to understand the challenge and prepare to meet it if he can.

(c) **Order to Compel More Proper Answer:** The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 6.5(a)(3) apply to the award of costs incurred in relation to the motion.

(d) **Effect of Admission and Relief From Admission:** Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. The court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits. Any admission made by a party under this rule is for the purpose of the pending action only and is not an admission by him for any other purpose nor may it be used against him in any other proceeding.

[Rule 6.2(e) deleted; content incorporated above.]

RULE 6.3 INTERROGATORIES TO PARTIES

(a) **Availability; Procedures for Use:** Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation of a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories may, without leave of court, be served upon the plaintiff after filing of the complaint and upon any other party with or after service of the summons and complaint upon that party.

The interrogatories shall be so arranged that after each separate question there shall appear a blank space reasonably calculated to enable the answering party to have his answer typed in: *Provided,* That an answering party who elects to have each question retyped prior to having his answer typed in, shall be permitted to do so.

Each interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the reasons for objection shall be stated in lieu of an answer. The answers are to be signed by the person making them, and the objections signed by the

attorney making them. The party upon whom the interrogatories have been served shall serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of the summons and complaint upon the defendant. The court may allow a shorter or longer time. The party submitting the interrogatories may move for an order under Rule 6.5(a) with respect to any objection to or other failure to answer an interrogatory.

(b) **Scope; Use at Trial:** Interrogatories may relate to any matters which can be inquired into under Rule 6.1(b) and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(c) **Option To Produce Business Records:** Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail as to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

RULE 6.4 PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) **Scope:** Any party may serve on any other party a request (1) to produce and permit the party making the request, or someone acting on his behalf, to inspect and copy, any designated documents (including writings, drawings, graphs, charts, photographs, phonorecords, and other data compilations from which information can be obtained, translated, if necessary, by the respondent through detection devices into reasonably usable form), or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 6.1 and which are in the possession, custody or control of the party upon whom the request is served; or (2) to permit

entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the merchandise or property or any designated object or operation thereon, within the scope of Rule 6.1.

(b) **Procedure:** The request may, without leave of court, be served upon the plaintiff after filing of the complaint and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 6.5 with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

A party who produces documents for inspection shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the request.

RULE 6.5 FAILURE TO MAKE DISCOVERY: SANCTIONS

(a) **Motion for Order Compelling Discovery:** Upon reasonable notice to other parties and all persons affected thereby, a party may apply for an order compelling discovery as follows:

(1) *Motion:* (i) If a deponent or a party fails to answer a question propounded or submitted under Rules 6.3, 7.3, or 7.4, or a corporation or other entity fails to make a designation under Rule 7.3(b)(4) or 7.4(a), the party seeking discovery may apply for an order compelling an answer or a designation.

(ii) If a party, in response to a request for inspection submitted under Rule 6.4, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the party seeking discovery may apply for an order compelling an answer or an order compelling inspection in accordance with the request.

(iii) On matters relating to a deposition or oral examination, the

proponent of the question may complete or adjourn the examination before he applies for an order.

If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 6.1(c).

(2) *Evasive or Incomplete Answer:* For purposes of this paragraph (a), an evasive or incomplete answer is a failure to answer.

(3) *Award of Costs of Motion:* If the motion is granted, the court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay the moving party the reasonable costs incurred in obtaining the order, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of costs unjust.

If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable costs incurred in opposing the motion, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of costs unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable costs incurred in relation to the motion among the parties and persons in a just manner.

(b) **Failure To Comply With Order:**

(1) If a deponent fails to be sworn or to answer a question after being directed to do so by the court, the failure may be considered a contempt of court.

(2) If a party or an officer, director, or managing agent of a party or a person designated under Rule 7.3(b)(4) or 7.4(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under paragraph (a) of this rule, or if a party fails to obey an order entered under Rule 6.1(f), the court may make such orders in regard to the failure as are just, and among others the following:

(i) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(iii) an order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action

or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising him or both to pay the reasonable costs caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of costs unjust.

(c) **Failure of Party To Attend at Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection:** If a party or a person designated under Rule 7.3(b)(4) or 7.4(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 6.3, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 6.4, after proper service of the request, the court, on motion, may make such orders in regard to the failure as are just, including any action authorized under subdivisions (i), (ii), (iii), and (iv) of subparagraph (b)(2) of this rule.

The failure to act described in this paragraph may not be excused on the ground that the discovery sought is objectionable, unless the party failing to act has applied for a protective order, as provided by paragraph (c) of Rule 6.1.

(d) **Costs on Failure To Admit:** If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 6.2, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable costs incurred in making that proof. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 6.2, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(e) **Failure to Participate in the Framing of a Discovery Plan:** If a party or his attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 6.1(f), the court may, after opportunity for hearing, require such party or his attorney to pay to any other party the reasonable costs caused by the failure.

(f) **Costs Against the United States:** Except to the extent permitted

by statute, costs and fees may not be awarded against the United States under this rule.

Chapter 7. Depositions

* * * * * * *

RULE 7.3 DEPOSITION UPON ORAL EXAMINATION

(a) **When Depositions May Be Taken:** After filing of the complaint, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint upon any defendant, except that leave is not required (1) if a defendant has served a notice of taking deposition or otherwise sought discovery, or (2) if special notice is given as provided in subparagraph (b)(7) of this rule. The attendance of witnesses may be compelled by subpoena as provided in Rule 10.1. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

(b) **Notice of Examination: General Requirements; Special Notice; Nonstenographic Recording; Production of Documents and Things; Deposition of Organization:**

(1) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the time and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs. If a subpoena *duces tecum* is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(2) The notice to a party deponent may be accompanied by a request made in compliance with Rule 6.4 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 6.4 shall apply to the request.

(3) The court may, for good cause shown, enlarge or shorten the time for taking the deposition.

(4) A party may in his notice and in a subpoena name as the deponent a public or private corporation or a partnership or association or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which he will testify. A subpoena shall advise a nonparty organiza-

tion of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This subparagraph (b)(4) does not preclude taking a deposition by any other procedure authorized in these rules.

(5) The parties may stipulate in writing or the court may upon motion order that the testimony at a deposition be recorded by other than stenographic means. The stipulation or order shall designate the person before whom the deposition shall be taken, the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. A party may arrange to have a stenographic transcription made at his own expense. Any objections under paragraph (c) of this rule, any changes made by the witness, his signature identifying the deposition as his own or the statement of the officer that is required if the witness does not sign, as provided in paragraph (e) of this rule, and the certification of the officer required by paragraph (f) of this rule shall be set forth in writing to accompany a deposition recorded by nonstenographic means.

(6) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone. For the purposes of this rule and Rule 7.6, a deposition taken by telephone is taken at the place where the deponent is to answer questions propounded to him.

(7) Leave of court is not required for the taking of a deposition by the plaintiff if the notice (i) states that the person to be examined is about to go out of the United States, or is bound on a voyage to sea, and will be unavailable for examination unless his deposition is taken before expiration of the 30-day period, and (ii) sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, and his signature constitutes a certification by him that to the best of his knowledge, information, and belief the statement and supporting facts are true.

If a party shows that when he was served with notice under this subparagraph (b)(7) he was unable through the exercise of diligence to obtain counsel to represent him at the taking of the deposition, the deposition may not be used against him.

(c) **Examination and Cross-Examination; Record of Examination; Oath; Objections:** Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of Rule 10.4. The officer before whom the deposition is to be taken shall put the witness on oath and shall personally, or by someone acting under his direction and in his presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with subparagraph (b)(5)

of this rule. If requested by one of the parties, the testimony shall be transcribed.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, or to the manner of taking it or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings, shall be noted by the officer upon the deposition. Evidence objected to shall be taken subject to the objections. In lieu of participating in the oral examination, parties may serve written questions in a sealed envelope on the party taking the deposition and require him to transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

(d) **Motion To Terminate or Limit Examination:** At any time during the taking of the deposition, on motion of any party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court may order the officer conducting the examination to cease from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in rule 6.1(c). If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 6.5(d) apply to the award of costs incurred in relation to the motion.

(e) **Submission to Witness; Changes; Signing:** When the testimony is fully transcribed, the deposition shall be submitted to the witness for examination and shall be read to or by him, unless such examination and readings are waived by the witness and by the parties. Any changes in form or substance which the witness desires to make shall be entered upon the deposition by the officer, with a statement of the reasons given by the witness for making them. The deposition shall then be signed by the witness, unless the parties by stipulation waive the signing, or the witness is ill or cannot be found or refuses to sign. If the deposition is not signed by the witness within 30 days of its submission to him, the officer shall sign it and state on the record the fact of the waiver, or of the illness or absence of the witness, or the fact of the refusal to sign, together with the reasons, if any, given therefor; and the deposition may then be used as fully as though signed, unless, on a motion to suppress under Rule 7.5(d) (4), the court holds that the reasons given for the refusal to sign require rejection of the deposition in whole or in part.

(f) **Certification and Filing by Officer; Exhibits; Copies; Notice of Filing:**

(1) The officer shall certify on the deposition that the witness was

duly sworn by him and that the deposition is a true record of the testimony given by the witness. He shall then securely seal the deposition in an envelope indorsed with the title of the action and marked: "Deposition of [here insert name of witness]" and shall promptly file it with the clerk of the court or send it by registered or certified mail to the clerk for filing and give prompt notice of its filing to the party taking the deposition.

Documents and things produced for inspection during the examination of the witness, shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them he may (i) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if he affords to all parties fair opportunity to verify the copies by comparison with the originals, or (ii) offer the originals to be marked for identification after giving to each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition to the court, pending final disposition of the case.

(2) Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent.

(3) The party taking the deposition shall give prompt notice of its filing to all other parties.

(g) **Failure To Attend or To Serve Subpoena; Costs:**

(1) If the party giving the notice of the taking of the deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the reasonable costs incurred by him and his attorney in attending.

(2) If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon him and the witness because of such failure does not attend, and if another party attends in person or by attorney because he expects the deposition of that witness to be taken, the court may order the party giving the notice to pay to such other party the reasonable costs incurred by him and his attorney in attending.

RULE 7.4 DEPOSITIONS OF WITNESSES UPON WRITTEN QUESTIONS

(a) **Serving Questions; Notice:** After filing of the complaint, any party may take the testimony of any person, including a party, by deposition upon written questions. The attendance of witnesses may be compelled by the use of subpeona as provided in Rule 10.1. The deposition of a person confined in prison may be taken only by leave of court on such terms as the court prescribes.

A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify him or the particular class or group to which he belongs and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 7.3(b)(4).

Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

(b) **Officer To Take Responses and Prepare Record:** A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rule 7.3 (c), (e), and (f), to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by him.

(c) **Notice of Filing:** When the deposition is filed the party taking it shall promptly give notice thereof to all other parties.

RULE 7.5 USE OF DEPOSITIONS IN COURT PROCEEDINGS

(a) **Use of Depositions:** * * *

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(2) The deposition of a party, or of anyone who at the time of taking the deposition was an officer, director, managing agent, or a person designated under Rule 7.3(b)(4) or 7.4(a) to testify on behalf of a public or private corporation, partnership, association or governmental agency which is a party, may be used by an adverse party for any purpose.

(3) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds: (i) that the witness is dead; (ii) that the witness if out of the United States, unless it appears that the absence of the witness was procured by the party offering the deposition; (iii) that the witness is unable to attend or testify because of age, illness, infirmity, or imprisonment; (iv) that the party offering the deposition has been unable to procure the

attendance of the witness by subpoena; or (v) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testomony of witnesses orally in open court, to allow the deposition to be used.

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(b) **Objections to Admissibility:** Subject to the provisions of Rule 7.7 and subparagraph (d)(3) of this rule, objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof, for any reason which would require the exclusion of the evidence if the witness were then present and testifying.

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(d) **Effect of Errors and Irregularities in Depositions:**

(1) *As to Notice:* All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(2) *As to Disqualification of Officer:* Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(3) *As to Taking of Deposition:* (i) Objections to the competency of a witness, or to the competency, relevancy, or materiality of testimony, are not waived by failure to make them during the taking of an oral deposition, unless the ground of the objection is one which might have been obviated, removed, or cured if presented at that time.

(ii) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived, unless seasonable objection thereto is made at the taking of the deposition.

(iii) Objections to the form of written interrogatories submitted under Rule 7.4 are waived, unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other interrogatories and within 10 days after service of the last interrogatories authorized.

(4) *As to Completion and Return of Deposition:* Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, signed, certified, sealed, indorsed, transmitted, filed, or otherwise dealt with by the officer under Rules 7.3 and 7.4, are waived, unless a motion to suppress the deposition or some part thereof

is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

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RULE 8.2 SUMMARY JUDGMENT

(a) **For Claimant:** A party seeking to recover upon a claim, may, at any time after the expiration of the initial time within which to file an answer or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

(b) **For Defending Party:** A party against whom a claim is asserted, may, at any time after the filing of a complaint, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

(c) **Motion and Proceedings Thereon:** Oral argument of the motion may be requested pursuant to the provisions of Rule 11.1. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

(d) **Case Not Fully Adjudicated on Motion:** If on motion under this rule judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at an oral argument of the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall if practicable ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.

(e) **Form of Affidavits; Further Testimony; Defense Required:** Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith, except that all papers and documents which are part of the official record of the action pursuant to Chapter 5 of these rules may be referred to in an affidavit without attaching copies, and shall be considered by the court without additional certification. The court may permit affidavits to be supplemented or opposed by depositions,

answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

(f) **When Affidavits are Unavailable**: Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

(g) **Affidavits Made in Bad Faith:** Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party employing them to pay to the other party the amount of the reasonable costs which the filing of the affidavits caused him to incur, and any offending party or attorney may be adjudged guilty of contempt.

[Rule 8.2(h) deleted; language incorporated above.]

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RULE 14.3 ACCESS TO AND WITHDRAWAL OF PAPERS

(a) **Custody and Control:** * * *

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(2) when requested by the Attorney in Charge, Field Office for Customs Litigation, Department of Justice, relevant papers may be transmitted by the clerk to an appropriate customs officer for the purpose of considering a submission upon agreed statement of facts pursuant to Rule 8.1, or for the purpose of answering an inquiry by an appropriate customs officer; or

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(b) **Temporary Withdrawal:**

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(2) The Attorney in Charge, Field Office for Customs Litigation, Department of Justice, may withdraw the relevant papers in an action to a designated place in his offices for a period not to exceed 30 days: *Provided*, That upon notice from the clerk, such papers shall immediately be returned to the office of the clerk.

(3) Any person, qualified in accordance with paragraph (b)(1) of this rule, may withdraw the relevant papers in an action to a designated place in the offices of the Customs Court or the Field

Office for Customs Litigation, Department of Justice: *Provided,* That such papers are returned to the office of the clerk no later than the close of business on the same day as they are withdrawn.

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RULE 14.6 RESERVE FILE

(a) **Placement in Reserve File:** All actions commenced pursuant to 28 U.S.C. §1582 (a) and (b) (except actions commenced pursuant to section 516A of the Tariff Act of 1930), and commenced in the court after the effective date of these rules (including all appeals for reappraisement and all protests received by the court after the effective date of these rules), and all actions described in Rule 14.9(c)(1) shall be placed in the reserve file for the month and year in which the action is commenced.

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Chapter 18. Parties; Notice to Interested Parties; Intervention; Substitution

RULE 18.1 DOMESTIC INTERESTED PARTIES: PRACTICE

(a) **Party in Interest:** In an action filed pursuant to section 516(c) of the Tariff Act of 1930, a party in interest described in section 516(e) of that Act shall be deemed to be a defendant for the purposes of the application of these rules.

(b) **Trial, Participation:** A party in interest who does not file responsive pleadings as required by these rules shall not be permitted to engage in the active conduct of the litigation unless, on motion for good cause shown, the court orders otherwise. If the court permits such a party to participate, the pleadings filed by the defendant, the United States, shall also be considered the pleadings of such party in interest for all purposes.

RULE 18.2 NOTICE TO INTERESTED PARTIES

Notice to Interested Parties: The party filing an action under section 516A of the Tariff Act of 1930 shall forthwith notify by registered or certified mail all interested parties who were parties to the administrative proceeding of the filing of an action in this court.

RULE 18.3 INTERVENTION

(a) **Intervention of Right:** Upon timely application anyone shall be permitted to intervene in an action when a statute of the United States confers an unconditional right to intervene.

(b) **Procedure:** A person desiring to intervene shall serve a motion to intervene upon the parties as provided in Rule 4.1. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

RULE 18.4 SUBSTITUTION OF PARTIES

(a) **Death:**

(1) If a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, shall be served on the parties as provided in Rule 4.1 and upon persons not parties in the manner provided in Rule 3.2(g) for the service of a summons. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion, the action shall be dismissed as to the deceased party.

(2) In the event of the death of one or more of the plaintiffs or of one or more of the defendants in an action in which the right sought to be enforced survives only to the surviving plaintiffs or only against the surviving defendants, the action does not abate. The death shall be suggested upon the record and the action shall proceed in favor of or against the surviving parties.

(b) **Incompetency:** If a party becomes incompetent, the court upon motion served as provided in paragraph (a) of this rule may allow the action to be continued by or against his representative.

(c) **Transfer of Interest:** In case of any transfer of interest, the action may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in paragraph (a) of this rule.

(d) **Public Officers; Death or Separation From Office:**

(1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution.

(2) When a public officer is sued in his official capacity, he may be described as a party by his official title rather than by name; but the court may require his name to be added.

Chapter 19. Injunctions

RULE 19.1 INJUNCTIONS

(a) **Preliminary Injunction:**

(1) *Notice:* No preliminary injunction shall be issued without notice

to the adverse party. A party may not seek injunctive relief prior to the filing of a verified complaint.

(2) *Consolidation of Hearing With Trial on Merits:* Before or after the commencement of the hearing of an application for a preliminary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing of the application. Even when this consolidation is not ordered, any evidence received upon an application for a preliminary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial.

(b) **Temporary Restraining Order; Notice; Hearing; Duration:** A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered of record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the adverse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(c) **Security:** No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages

as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

(d) **Form and Scope of Injunction of Restraining Order:** Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

APPENDIX A

FORM OF SUMMONS IN AN ACTION TO CONTEST DENIAL OF PROTEST

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[No change in "Instructions for Use" or in summons form.]

APPENDIX B–1

FORM OF SUMMONS IN ACTIONS UNDER 19 U.S.C. § 1516(c)

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[Only change is deletion of "By American Manufacturers, Producers, or Wholesalers" in caption; "Instructions for Use" and summons form will remain the same.]

APPENDIX B–2

FORM OF SUMMONS IN ALL OTHER ACTIONS

Instructions for Use

The summons consists of a single page (CC–SB2), setting forth identifying information concerning the determination contested in the action.

An original and 3 copies of the summons shall be filed, unless the action involves more than one defendant in which case an additional copy of the summons shall be filed for each additional defendant.

UNITED STATES CUSTOMS
COURT, PLAINTIFF.

v.

UNITED STATES, DEFENDANT.

SUMMONS

TO: The Attorney General, the Secretary of the Treasury, the International Trade Commission, or the Administering Authority:

PLEASE TAKE NOTICE that a civil action has been commenced to contest the determination described below.

_____
Clerk of the Court

1. _____

(Name and standing of plaintiff)

2. _____

(Brief description of contested determination)

3. _____

(Date of determination)

4. _____

(If applicable, date of publication in Federal Register of notice of contested determination)

5. _____

(Name, signature, post office address, and telephone number of attorney filing summons or the individual filing summons in his own behalf)

(CC–SB2)

(T.D. 79-307)

Leather Handbags From Colombia Revocation of Countervailing Duty Determination

Countervailing duty order with respect to leather handbags from Colombia is revoked; section 159.47, Customs Regulations, amended

TITLE 19—CUSTOMS DUTIES

CHAPTER I—U.S. CUSTOMS SERVICE, DEPARTMENT OF THE TREASURY

PART 159—LIQUIDATION OF DUTIES

AGENCY: U.S. Customs Service, Treasury Department.

ACTION: Revocation of countervailing duty determination.

SUMMARY: This notice is to inform the public that the countervailing duty determination on leather handbags from Colombia is being revoked because the subsidies paid to exporters and/or manufacturers of this merchandise have been eliminated and there is no likelihood of resumption.

EFFECTIVE DATE: Exports on or after November 15, 1979.

FOR FURTHER INFORMATION CONTACT: Charles F. Goldsmith, Economist, Office of Tariff Affairs, U.S. Department of the Treasury, 15th Street and Pennsylvania Avenue N.W., Washington, D.C. 20220, telephone 202-566-2951.

SUPPLEMENTARY INFORMATION: A notice entitled "Leather Handbags from Colombia; Final Countervailing Duty Order," T.D. 78-125, was published in the Federal Register of May 2, 1978 (43 F.R. 18660). That notice stated that it had been determined that manufacturers and/or exporters of leather handbags from Colombia received benefits which constituted the payment or bestowal of a bounty or grant, within the meaning of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. 1303), by virtue of the granting of a tax rebate certificate, known as a "CAT", by the Government of Colombia upon export of the subject merchandise. Accordingly, imports of leather handbags from Colombia were subject to countervailing duties.

Concurrent with the above determination, a notice entitled "waiver of Countervailing Duties—Handbags from Colombia", T.D. 78-124, concerning the subject merchandise was published in the Federal Register (43 F.R. 18659). The waiver was conditioned on the gradual elimination of the net bounty determined by Treasury through actions taken by Colombian handbag exporters to renounce their receipt of the benefit. This renunciation has already occurred.

Subsequent to the waiver, due to facts brought to light in a separate

countervailing duty determination involving Certain Textiles and Textile Products from Colombia (43 F.R. 53525), Treasury determined that there was an additional benefit received by Colombian handbag exporters after reconsidering two allowances earlier permitted. Those allowances involved the effective reduction of the value of the CAT through its discount in the stock exchange and its further reduction due to currency devaluation. This resulted in additional bounty of 0.6 percent ad valorem for exporters of handbags from Colombia.

As of November 15, 1979, the Colombian handbag exporters renounced the additional benefit, leaving no further "net subsidy" derived from the tax rebate certificate program. The Government of Colombia will continue to provide Treasury with quarterly reports confirming the renunciation of benefits. Accordingly, it is determined that a bounty or grant within the meaning of section 303, Tariff Act of 1930, as amended (19 U.S.C. 1303), is no longer being paid or bestowed upon the manufacture, production or exportation of leather handbags from Colombia, and there is no likelihood of resumption of the payment or bestowal of a bounty or grant on such merchandise.

T.D. 78–125 is hereby revoked with respect to all entries of dutiable leather handbags exported from Colombia on or after November 15, 1979; entries of this merchandise exported prior to that date are still eligible for the waiver of countervailing duties. Customs officers will be instructed to proceed with liquidation of all entries of the subject merchandise without regard to countervailing duties.

The table in section 159.47(f) of the Customs Regulations (19 CFR 159.47) is amended by deleting from the column headed "Country", the name "Colombia"; from the column headed "Commodity", the words "Handbags" and "Leather handbags"; from the column headed "Treasury decision," the Nos. "78–124" and "78–125"; and from the column headed "Action", the words "Bounty declared-rate" and "Imposition of countervailing duties waived".

(R.S. 251, sections 303, as amended, 624, 46 Stat. 687, 759,88 Stat. 2049, 19 U.S.C. 66, 1303, as amended, 1624.)

Pursuant to Reorganization Plan No. 26 of 1950 and Treasury Department Order No. 101–5, May 16, 1979, the provisions of Treasury Department Order No. 165, revised, November 2, 1954, and section 159.47 of the Customs Regulations (19 CFR 159.47), insofar as they pertain to the issuance of revocation order by the Commissioner of Customs, are hereby waived.

DAVID R. BRENNAN,
Acting General Counsel of the Treasury.

Dated: November 30, 1979.

[Published in Federal Register Dec. 6, 1979 (44 FR 70138)]

(T.D. 79-308)

Foreign Currencies—Daily Rates For Countries not on Quarterly List

Rates of exchange based on rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York for the Brazil cruziero, People's Republic of China yuan, Hong Kong dollar, Iran rial, Philippines peso, Singapore dollar, Thailand baht (tical), and Venezuela bolivar

The Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), has certified buying rates for the dates and foreign currencies shown below. The rates of exchange, based on these buying rates, are published for the information and use of Customs officers and others concerned pursuant to part 159, subpart C, Customs Regulations (19 CFR 159, support C).

Brazil cruziero:	
November 26–30, 1979	$0.0312
People's Republic of China yuan:	
November 26–28, 1979	$0.654707
November 29–30, 1979	.657981
Hong Kong dollar:	
November 26, 1979	$0.199780
November 27, 1979	.199880
November 28, 1979	.200622
November 29, 1979	.200965
November 30, 1979	.200924
Iran rial:	
November 26–30, 1979	Not available
Philippines peso:	
November 26–30, 1979	$0.1350
Singapore dollar:	
November 26, 1979	$0.458400
November 27, 1979	.458295
November 28, 1979	.457561
November 29, 1979	.457457
November 30, 1979	.459453
Thailand baht (tical):	
November 26–30, 1979	$0.0495

305-506—79——4

Venezuela bolivar:
November 26–30, 1979 ..... $0.2329

(LIQ–3–TRODE)

Dated: December 5, 1979.

DANIEL D. SULLIVAN
(for G. Scott Shreve, Acting
Director, Duty Assessment Division).

(T.D. 79–309)

Foreign Currencies—Variances From Quarterly Rate

Rates of exchange based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York

The following rates of exchange are based upon rates certified to the Secretary of the Treasury by the Federal Reserve Bank of New York, pursuant to section 522(c), Tariff Act of 1930, as amended (31 U.S.C. 372(c)), and reflect variances of 5 per centum or more from the quarterly rate published in T.D. 79–264 for the following countries. Therefore, as to entries covering merchandise exported on the dates listed, whenever it is necessary for Customs purposes to convert such currency into currency of the United States, conversion shall be at the following rates:

Japan yen:

November 26, 1979	$0.003986
November 27, 1979	.004009
November 28, 1979	.004017
November 29, 1979	.004018
November 30, 1979	.004007

Switzerland franc:

November 26, 1979	$0.605144
November 27, 1979	.605877
November 28, 1979	.611060

(LIQ–3–TRODE)

Date: December 5, 1979.

DAVID D. SULLIVAN,
for G. SCOTT SHREVE,
Acting Director,
Duty Assessment Division.

U.S. Customs Service

Customs Service Decisions

DEPARTMENT OF THE TREASURY,
OFFICE OF THE COMMISSIONER OF CUSTOMS,
Washington, D.C.

The following are decisions made by the U.S. Customs Service where the issues involved are of sufficient interest or importance to warrant publication in the CUSTOMS BULLETIN.

Dated: November 27, 1979.

HARVEY B. FOX,
Acting Director,
Office of Regulations and Rulings.

(C.S.D. 79-396)

Classification: "Lace" Openwork on Ladies' Acrylic Sweater

Date: May 3, 1979
File: CLA-2:R:CV:MC
061104 BB

DISTRICT DIRECTOR OF CUSTOMS,
Los Angeles, Calif. 90731.

DEAR SIR: This ruling concerns a request for internal advice on the classification of a ladies' acrylic knit sweater (your file CLA-2-L:C:D-11 JFF).

Issue.—The question presented is whether the subject sweater is properly considered "lace" for tariff purposes.

Facts.—The submitted sample is a ladies' 100-percent acrylic knit pullover sweater. Laboratory analysis indicates the sweater was probably constructed on a Raschel type warp knitting machine. The sample is composed of rib knitting at the neck opening, cuffs, and bottom edge, with the remainder of the body composed of an openwork fabric construction with an inwrought design.

Law and Analysis.—Lace is generally considered to be an openwork fabric with a preconceived inwrought design. It has also been defined as an ornamental or decorative openwork fabric in which the ornamentation and fabric are produced concurrently by the intertwisting of threads. See *E. C. Carter & Son, Inc.* v. *United States*, 38 Cust. Ct. 368, C.D. 1889 (1957); C.I.E. N. 36/75.

Headnote 2(h), schedule 3, Tariff Schedules of the United States (TSUS), provides that a lace article is an article which is wholly or almost wholly of lace whether that lace preexisted the article or was formed in the process of producing the article. General Headnote 9(f)(iii), TSUS, defines "almost wholly of" as meaning that the essential character of the article is imparted by the named material, notwithstanding that significant quantities of other material may be present.

Analysis of the submitted sample reveals a significant amount of openwork, fancy ribbing and loose knit resulting from the operation of the knitting needles in accordance with preconceived designs transmitted through the patterning device. This construction creates a highly decorative appearance when the sweater is worn. Therefore, we conclude the subject sweater contains a significant amount of openwork, that this openwork is a lace construction, and that the lace construction imparts the essential character of the sweater.

Holding.—The subject sweater is properly considered of "lace" for tariff purposes, and is classifiable as an article of lace wearing apparel in item 382.04, TSUS, dutiable, if imported from Taiwan, at the column 1 rate of 42.5 percent ad valorem.

(C.S.D. 79-397)

Classification: Synthetic Sapphire Wire Guides Used as Teleprinter Parts

Date: April 17, 1979
File: CLA-2:R:CV:MSP
061087 LLB

AREA DIRECTOR OF CUSTOMS,
New York Seaport Area,
New York, N.Y. 10048.

DEAR SIR: This ruling concerns the proper classification of certain wire guides made of synthetic sapphire, designed to be used in high-speed teleprinters. Each of the guides consists of two halves with either seven or nine grooves which form holes when the halves are combined and held together by two metal bars. When assembled, the

articles guide wires in a teleprinter, aiding the print head in forming characters in a dot matrix pattern.

Issue.—Whether the synthetic sapphire wire guides are properly classified as synthetic gemstone materials under item 520.75, Tariff Schedules of the United States (TSUS), dutiable at 15 percent ad valorem, or under item 684.64, TSUS, as parts of electric telegraph and printing apparatus, dutiable at 7 percent ad valorem.

Facts.—The imported articles are made of synthetic sapphire, and are designed exclusively for use in high-speed teleprinters, serving as guides for wires which are driven by solenoids at high speed. Up to 600 characters per second are printed, thus requiring that the wire guide material be able to withstand a great deal of friction. Synthetic sapphire, being extremely hard material, fulfills the need for a friction-resistant substance.

An earlier headquarters ruling stated that synthetic gemstone needle guides used in the computer industry were properly classified under item 520.75 (CLA-2:R:CV:MS, 047876 M, March 30, 1977).

Evidence indicates that the sapphire wire guides are used only in conjunction with the operation of dot matrix teleprinters.

Law and analysis.—Item 520.75, TSUS, provides:

Synthetic materials of gemstone quality, such as, but not limited to, corundum, spinel, and rutile, and articles not specially provided for, of such materials * * * Other	15% ad val.

Item 684.64, TSUS, provides:

Electrical telegraph (including printing and typewriting) and telephone apparatus and instruments, and parts thereof * * * Other	7% ad val.

In the earlier cited decision concerning ruby needle guides, designation of the articles as parts of computers was precluded by the restrictive language of headnote 1(iv), schedule 6, part 4, TSUS. The only alternative classification for the articles was, therefore, as synthetic materials of gemstone quality, under item 520.75, TSUS.

No such restrictive language appears in the headnotes to schedule 6, part 4, TSUS, which would preclude the articles presently under consideration from inclusion under item 684.64, TSUS, the provisions of which appear to more precisely identify these articles than to those of item 520.75, TSUS.

Conclusion.—Accordingly, we believe that the synthetic sapphire wire guides being considered in this matter are properly classified as parts of telegraph apparatus under item 684.64, TSUS, dutiable at a rate of 7 percent ad valorem.

(C.S.D. 79–398)

Enforcement: Concurrent Responsibility of U.S. Customs Service and U.S. Coast Guard for Enforcement of Navigation Law; 46 U.S.C. 319

Date: April 23, 1979
File: ENF–4–02.1:R:E:M
609485 SG

To: District Director of Customs, Detroit, Mich. 48226.
From: Director, Entry Procedures and Penalties Division.
Subject: Internal advice concerning the imposition of a penalty under title 46, United States Code, section 319.

In a memorandum dated January 10, 1979, from the F.P. & F. officer in Detroit (case number), guidance is requested in disposing of a penalty (under $25,000), assessed under the provisions of title 46, United States Code, section 319. It is indicated that this is a violation which is not covered in the F.P. & F. Manual, nor is there precedent in the field.

Title 46, United States Code, section 319, requires that vessels over 5 tons found trading or carrying on in the fishery, be enrolled and licensed and provides for a $30 fine assessed at every port of arrival without the enrollment or license.

Pursuant to section 2(c) of a memorandum of agreement dated April 28, 1967 (32 F.R. 7408), Customs and the Coast Guard share the responsibility for enforcement of various functions under the navigation laws. Circular VES–1–R:CD:C x ENF–4, dated July 26, 1973, entitled "Vessels; Enforcement Responsibilities of Coast Guard and Bureau of Customs for Certain Navigation Laws", provides that whatever agency discovers a violation of section 319 shall assume the enforcement responsibility. Since the violation in the subject case was discovered by Customs, the enforcement responsibility is that of Customs. We note, however, that notwithstanding the above, the assessment and mitigation of the penalty should be coordinated with the Coast Guard to assure uniformity.

Section 171.21 of the Customs Regulations (19 CFR 171.21) confers authority upon your office to act on petitions when the claim is $25,000 or less. Insofar as the penalty assessed in this case is (less) we are referring this matter back to your office for your consideration and disposition.

(C.S.D. 79-399)

Drawback: Filing Proof of Exportation Under the Uncertified Notice of Exportation Procedure

Date: April 23, 1979
File: DRA-1-09-R:CD:D
210009 NK

Issue.—Whether the submission of a statement by a drawback claimant certifying that proof of exportation is on file at the claimant's office is sufficient to satisfy the optional uncertified notice of exportation procedure under section 22.7(c) of the Customs Regulations.

Facts.—A foreign government, for security reasons, requests a waiver of the requirement under section 22.7(c) of the Customs Regulations that an uncertified notice of exportation on Customs form 7511 "shall be supported by documentary evidence of exportation such as the bill of lading * * * or certified copies thereof, issued by the exporting carrier."

The drawback claimant proposes to submit a statement that such documentary evidence is available for inspection at the claimant's office.

Law and analysis.—Section 1313(j), title 19, United States Code, provides that the allowance of drawback privileges shall be subject to compliance with such rules and regulations as the Secretary of the Treasury shall prescribe. In accordance with this statutory authority, section 22.7 of the Customs Regulations provides for three optional procedures whereby the exportation of articles covered by a drawback claim "shall" be established:

1. Certified Notice of Exportation (22.7(b)),
2. Uncertified Notice of Exportation (22.7(c)), or
3. Exporter's Summary (22.7(d)).

Certified notice of exportation procedure.—Except for mail or government exportations, a certified notice of exportation on Customs form 7511 shall be filed with the shipper's export declaration by the exporter or his agent with the district director of Customs at the port at which the shipment is to be exported. A copy of the district director's certificates of the notice of exportation is returned to the exporter as proof of exportation of the merchandise for subsequent filing with the drawback entry.

Uncertified notice of exportation procedure.—The drawback claimant may choose to support a drawback entry with an uncertified notice of exportation on Customs form 7511. In this case, a shipper's export declaration is not required and Customs form 7511 need not be certified by the district director. However, to prevent fraud and to

protect the revenue, the regulations require that "an uncertified notice of exportation shall be supported by documentary evidence of exportation, such as the bill of lading, air waybill, freight waybill, Canadian customs manifest, cargo manifest, or certified copies thereof, issued by the exporting carrier, and any additional evidence required by Customs officers to fully establish the time and fact of exportation."

In the completion of drawback claims, section 22.13 of the Customs Regulations requires the following:

> When the entry covers exports under 22.7(b), the copy of the notice of exportation certified by the district director of Customs shall be filed with the entry.
>
> When the entry covers exports under 22.7(c), one copy of the uncertified notice of exportation together with the original or a certified copy of the supporting document shall be filed.

It is clear that if the drawback claimant chooses to use the uncertified notice of exportation procedures as proof of exportation, Customs form 7511 shall be supported by the filing with Customs of documentary evidence such as the bill of lading.

Possible alternative—exporter's summary procedure.—The Regional Commissioner of Customs with whom drawback claims will be filed may accept an application to use the exporter's summary procedure under certain conditions. Under this procedure the drawback entry shall be supported by a chronological summary of the exports and any additional evidence required by Customs officers. Evidence of exportation *shall be retained by the exporter-claimant* for examination by authorized government officials for a period of 3 years from the date of drawback payment and a bond must be furnished to protect the revenue.

Holding.—When the uncertified notice of exportation procedure on Customs form 7511 is used to establish proof of exportation, supporting documentary evidence required by 22.7(c) of the Customs Regulations shall be filed with the entry as a requisite for drawback payment.

(C.S.D. 79-400)

Manifesting: Proper Units of Measurement in Column 9, Cargo Declaration

Date: May 24, 1979
File: VES-8-01-R:CD:C
103231 DR/PC

This ruling concerns the proper unit of weight or measurement to be included in columns 8 and 9, Customs Form 1302: Cargo Declaration.

Issue.—Whether metric units of measurement can be used in column

9 of the Customs Form 1302: Cargo Declaration, in lieu of measurements specified in the Tariff Schedules of the United States (TSUS).

Law and Analysis.—Section 4.7a(c) (1), Customs Regulations, provides that "The goods described in columns Nos. 6 and 7, and either 8 or 9 shall refer to the respective bills of lading. Either column 8 or 9 shall be used, as appropriate. The gross weight in column 8 shall be expressed in either pounds or kilograms. The measurement in column 9 shall be expressed in the unit of measure specified in the Tariff Schedules of the United States (19 U.S.C. 1202)."

This requirement is based upon the provisions of section 431, Tariff Act of 1930 (19 U.S.C. 1431), which states that the master shall have on board his vessel "* * * a manifest in a form to be prescribed by the Secretary of the Treasury. * * *" Such manifest to contain "a detailed account of all merchandise on board. * * *" Although the law is silent on measurement, certain articles in the Tariff Schedules are dutiable according to their measurement, i.e., volume, area, or length. It is convenient for Customs to determine the revenue involved if the measurement in column 9 is consistent with that set forth in the TSUS. However, the conversion from metric units to the units in the TSUS can be readily accomplished.

Holding.—In the case of articles which are listed on the Customs Form 1302: Cargo Declaration, and are dutiable according to weight, column 8 of the declaration must be completed showing the weight either in pounds or in kilograms (metric). In the case of articles which are listed on the Declaration and are dutiable according to volume, area, or length, column 9 of the Declaration must be completed, preferably in the units of measurement specified in the tariff schedules. However, metric units of measurements are acceptable.

(C.S.D. 79–401)

Prohibited and Restricted Importations: Trademark Infringement; "Professional Buyer" Rule

Date: May 1, 1979
File: TMK–3–R:E:R
709649 O

This ruling concerns the applicability of the prohibition set forth in 19 U.S.C. 1526 against the importation of foreign merchandise bearing an American trademark.

Issue.—Would the importation of an enzyme product used in clarifying plant juices and extracts with the brand name "Pectinex"

infringe upon the rights of the American trademark owner of the mark "Pectinol."

Facts.—Our New York regional office requested redelivery of a shipment of 40 cans of a pectolytic enzyme product bearing the name "Pectinex." This name was considered to be confusingly similar to "Pectinol," the registered trademark for a similar enzyme product owned by Rohm & Haas Co. of Philadelphia, which has been recorded with Customs for import protection. The attorneys for the importer have submitted a letter dated November 9, 1978, to our New York regional office, which was referred to Customs Headquarters for consideration. Subsequently, on February 8, 1979, an attorney for the importer visited our office and, as a result of the discussions that ensued, requested that he be allowed to present additional legal arguments in support of his client's position that "Pectinex" would not infringe on the registered trademark, "Pectinol." Additional legal arguments were presented in a letter of March 14, 1979.

The attorneys for the importer stated that both "Pectinex" and "Pectinol" are sold exclusively to companies engaged in the fruit processing business. It is also stated that the enzyme products in question are sold exclusively to sophisticated professional or commercial buyers who would not likely be confused by trademarks which are closely similar. In addition, the law firm has submitted unequivocal statements by actual purchasers of the two products, attesting to the fact that they have used "Pectinex" and have not confused it with the Rohm & Haas product, "Pectinol." It is further alleged that "Pectinex" has been on the market in the United States since 1971, without complaint from Rohm & Haas Co.

The law firm representing the importer pointed out that the word "pectin" is a descriptive term as applied to products which act on pectin. They furnished 20 examples of names using some form of the term "pectin" which have been accepted for registration as a trademark by the U.S. Patent Office. Several court cases were cited in support of their argument. For the above reasons, the attorneys have requested concellation of the redelivery notice.

Law and analysis.—Section 526 of the Tariff Act of 1930, as amended (19 U.S.C. 1526) and part 133 of the Customs Regulations (19 CFR 133) provide for the recordation with Customs for import protection of trademarks which have been registered in the Patent Office by a person domiciled in the United States. Articles of foreign or domestic manufacture bearing a mark copying or simulating a recorded trademark imported into the United States in violation of this provision shall be denied entry and are subject to seizure and forfeiture as prohibited importations.

Infringement of federally registered marks is governed by the test of

whether defendant's use is likely to cause confusion, or to cause mistake, or to deceive. Descriptive words such as "pectin" which have little trademark significance will not be regarded as the dominant portion of the mark, because the word may be used by everyone. While it is true that marks must be considered in their entireties, it is well settled that no one can appropriate as a trademark a generic name or one descriptive of an article of trade, its qualities ingredients, or characteristics. It is evident that the suffixes "ex" and "ol" neither look nor sound alike.

Furthermore, there are many court decisions which hold that where a relevant buyer class is composed of professional or commercial buyers familiar with the field, they are sophisticated enough not to be confused by trademarks which are closely similar. Thus, in a professional buyer situation, a finding that there is a "likelihood of confusion" is more difficult to obtain, due to the fact that the law recognizes and attributes superior knowledge and awareness to that class of purchaser.

Holding.—We are of the opinion that this case falls within the purview of the professional buyer cases, and therefore, there is little likelihood of confusion. Accordingly, entry of the imported enzyme product known as "Pectinex" would not be prohibited as infringing on the registered trademark "Pectinol." We are taking appropriate steps to rescind the instructions in our manual supplement TMK–2(2) of August 24, 1978, which call for the detention of future shipments of enzyme products bearing the trademark "Pectinex." You may furnish both parties with a copy of this decision.

(C.S.D. 79–402)

Drawback: Whether an Examination of Accounting and Financial Records is Necessary to Verify a Drawback Claim

Date: May 1, 1979
File: DRA–1–09–R:CD:D
209994 B

Issue.—Is an examination of accounting and financial records necessary to verify a claim for drawback?

Facts.—Auditors at some regions examine financial records of drawback claimants when verifying claims. The auditors cite as authority section 22.43(c) of the Customs Regulations. A national committee comprised of representatives of corporate drawback claimants feels that such examination is unnecessary if the claim can be verified by examination of manufacturing and shipping records. The committee wishes to amend the noted regulation to allow auditors to examine

financial and accounting records only if the claim cannot be verified by manufacturing and shipping records.

Law and analysis.—Section 1313(a), title 19, United States Code, provides in part:

> Upon the exportation of articles manufactured or produced in the United States with the use of imported merchandise, the full amount of duties paid upon the merchandise so used shall be refunded as drawback, less 1 per centum of such duties, * * *.

The sole reference to "accounting and financial records" in the regulations is found in section 22.43(c), which provides:

> The verifying official shall verify the claim and material set forth in the related drawback statement. Similar action shall be taken upon receipt of the first drawback claim filed under an amendment of a drawback rate. Verification as to drawback rates and amendments shall include an examination of the manufacturing records and all other accounting and financial records relating to the transaction.

Drawback law requires only that a claimant show importation, use in manufacturing, and exportation, and it is irrelevant whether a claimant paid for the imported merchandise or was paid for the exported articles. However, financial and accounting records are relevant in verifying the reliability of the records presented to establish importation, use in manufacturing, and exportation, and are viewed for this purpose.

Holding.—When verifying drawback claims, auditors have the authority to examine accounting and financial records. However, if by means of manufacturing records, the claimant can prove importation, use in manufacturing, and exportation to the satisfaction of the auditor, examination of financial records is not required.

(C.S.D. 79–403)

Country-of-Origin Marking: Cassette Shells

Date: May 2, 1979
File: MAR–1–01:R:E:E
709801 HS

This ruling concerns country-of-origin marking for individual cassette shells.

Issue.—Whether it is necessary for country-of-origin markings to appear on individual cassette shells if the assembled shells will only be sold to producers of tape cassettes who will know their origin and who will change their name, character and use after importation.

Facts.—The cassette shells are empty tape cassettes that will be ultimately sold to producers of prerecorded or blank tape cassettes in the United States. These producers will insert either prerecorded tapes into the shells after importation or insert blank tapes.

The cassette shells will be marketed directly to these producers. A Customs broker in the United States will act as importer of record, and the cassettes will be consigned directly to the purchasers.

Law and analysis.—Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304) provides in general that all articles of foreign origin imported into the United States must be legibly and conspicuously marked to indicate the English name of the country of origin to an ultimate purchaser in the United States.

There are, however, certain exceptions to the general rule. Among the exceptions are section 304(a)(3)(H) which provides that if an ultimate purchaser, by reason of the character of an article or by reason of the circumstances of its importation, necessarily knows the country of origin of the article, the article need not be marked to indicate its origin.

According to *United States* v. *Gibson-Thomson Co., Inc.* 27 CCPA 207(1940), a manufacturer would be considered an ultimate purchaser if a manufacturing process is performed on an imported item so that the item loses its identity and becomes an integral part of a new article with a new name, character, and use.

An item might lose its identity and become an integral part of a new article by becoming functionally necessary to the new article rather than being merely decorative or accessory, or by having little or no value as an item of commerce apart from its being part of the new article.

The cassette shells, in this case, are obviously functionally necessary to cassette tapes. The shells also would have little value as items of commerce apart from being part of cassette tapes. Therefore, the shells become an integral part of the cassette tapes and producers of the cassette tapes are the ultimate purchasers.

For section 304(a)(3)(H) to apply, the only other requirement is that the ultimate purchaser necessarily know the origin of the shells. In this case, there will be direct communication between the foreign supplier and the U.S. purchaser, with the Customs broker merely performing the act of importation. The cassette shells are to be marketed directly to the producers of the tape cassettes in the United States and the cassette shells will be consigned directly to these ultimate purchasers. Therefore, the ultimate purchasers will necessarily know the origin of the cassette shells and the shells need not be marked as they fall under the 304(a)(3)(H) exception.

Holding.—It is not necessary for country-of-origin markings to

appear on individual cassette shells if the shells will only be sold to producers of tape cassettes who will know their origin and who will change their name, character, and use after importation.

(C.S.D. 79–404)

Country-of-Origin Marking: Frozen Vegetables Imported in Bulk and Repackaged Into Individual Consumer Units

Date: May 2, 1979
File: MAR–2–05:R:E:E
709922 HS

This ruling concerns country-of-origin marking on individual consumer units containing frozen vegetables that were imported in a bulk state.

Issue.—Whether it is necessary to mark the individual consumer units in which frozen vegetables imported in bulk are repacked.

Facts.—Frozen vegetables are imported in a bulk state. The vegetables are then repacked into consumer units for retail sale.

Law and analysis.—Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304) provides in general that all articles of foreign origin imported into the United States must be legibly and conspicuously marked to indicate the English name of the country of origin to an ultimate purchaser in the United States.

However, there are exceptions to this marking requirement. Under section 134.32(a), Customs Regulations, articles incapable of being marked are excepted from marking. In this case, frozen vegetables such as corn, cauliflower, brussel sprouts, carrots, green beans, broccoli, and peas imported in bulk cannot be marked individually, and the marking of their containers would be sufficient for importation into the country.

When goods which are excepted from individual marking requirements are repacked after importation for sale in the United States, the new packages do not have to be marked to indicate the country of origin, providing that the repackaging is not done for purposes of concealing the country of origin by substituting an unmarked container for a marked one. Therefore, Customs would not require the individual consumer units containing the frozen vetetables to be marked with the vegetable's country of origin. Of course, any marking requirements set by other agencies such as the Food and Drug Administration or the Federal Trade Commission would have to be complied with.

Holding.—When goods imported in bulk excepted from individual marking requirements are repackaged after importation for sale in the

United States, the new packages do not have to be marked to indicate the country of origin, providing the repacking is not done for purpose of concealing the country of origin.

(C.S.D. 79–405)

Drawback: Determination of Amount of Drawback When a Drawback Product is Designated as the Basis for Drawback

Date: May 4, 1979
File: DRA–1–R:CD:D
210347 NK

Issues.—1. When a "drawback product" is designated as the basis for drawback, is the amount of drawback determined by the duty that would have been collected had the "drawback product" been imported or by the duty paid on the imported merchandise?

2. Is orange juice (single strength) extracted from domestic oranges of the "same kind and quality" as reconstituted juice from concentrated orange juice?

Facts.—A processor proposes to do the following:

1. Manufacture reconstituted (single strength) 11.8° Brix orange juice with the use of imported 65° Brix concentrated orange juice;
2. Further manufacture the reconstituted juice by a pasteurization process;
3. Export pasteurized (single strength) orange juice manufactured with the use of juice from domestic oranges; and,
4. Claim drawback for the exported juice. The column 1 rates of duty for concentrated orange juice is 35 cents per gal. (165.35, TSUS), whereas reconstituted or single strength orange juice is dutiable at the rate of 20 cents per gal. (165.30, TSUS).

Law and analysis.

Issue 1—Drawback Products and Basis for Refund

Articles manufactured under drawback conditions in compliance with the drawback law (19 U.S.C. 1313) and regulations are known as drawback products and may be designated as the basis for drawback on exported articles manufactured with the use of merchandise of the same kind and quality under an approved drawback contract (rate).

When such a procedure is followed under a combination section 1313(a) and section 1313(b) contract in compliance with the regulations, the amount of drawback is determined by the duty paid on the imported merchandise. Of course, section 1313(b) provides that the total amount of drawback allowed shall not exceed the duty paid on the imported merchandise.

Issue 2—Same Kind and Quality

Under section 1313(b), the substituted domestic merchandise and the designated imported merchandise (or drawback products) used in production must be of the same kind and quality. The deciding issue, as to applicability of drawback to the facts described, is whether reconstituted orange juice from concentrate is of the same kind and quality as orange juice extracted from domestic oranges.

In determining questions of same kind and quality for citrus products, we consider many sources such as the standards of grades for citrus products set forth in the regulations of the Department of Agriculture and the Food and Drug Administration, technical advice, and standards set by the industry. The official rules of the State of Florida Department of Citrus affecting the Florida citrus industry are a source material for standards set by an industry which is located primarily in that State.

The regulations of the Food and Drug Administration (21 CFR 146.135 and 146.137) identifies orange juice, chilled or frozen, as the "unfermented juice obtained from mature oranges of the species Citrus sinensis" and the products are known as "orange juice" and "frozen orange juice". Orange juice from fresh oranges may differ in degrees Brix, color, and taste depending upon the type of orange, its maturity and the season. Orange juice is primarily used to manufacture citrus products and used as "cutback" in the manufacture of frozen concentrated orange juice.

Orange juice from concentrate (reconstituted juice) is identified in section 146.145, title 21, CFR. It is known as "Orange juice from concentrate" and the product is required to be labeled as such. The reconstituted juice from frozen concentrated orange juice and concentrated orange juice for manufacturing (21 CFR 146.146 and 146.153) may also contain a volume of juice obtained from mature oranges of the species citrus reticulata (tangerines). Reconstituted orange juice from concentrate is generally a finished product ready for consumption. It is questionable whether it is economical or feasible to be used as "cutback". The regulations of the Department of Agriculture (7 CFR 2852.5681–2852.5692) set forth certain standards for grades of orange juice from concentrate (reconstituted juice) such as color, taste, and minimum degree Brix (11.8°).

Accordingly, we conclude that orange juice extracted from domestic oranges is not of the same kind and quality as reconstituted orange juice from concentrates as required by section 1313(b), title 19, USC. Each product has a different name, character and use.

Holding.—1. The duty paid on imported merchandise determines

the amount of drawback when a "drawback product" is designated as the basis for drawback.

2. Chilled or frozen orange juice is not of the same kind and quality as orange juice from concentrate.

(C.S.D. 79–406)

Country-of-Origin Marking: Giveaway Advertising Pencils

Date: May 7, 1979
File: MAR–2–05:R:E:E
709964 CSB

This ruling concerns the tariff classification and country-of-origin marking requirements of plastic pencils imported from Taiwan.

Issues.—Whether or not the pencils may be imported into the United States free of duty if the combined cost of labor and material in Taiwan is more than 35 percent of the retail price in the United States.

Will marking of the containers instead of individual marking meet the country-of-origin marking requirements?

Is "Taiwan" instead of "Made in Taiwan" an acceptable country-of-origin marking?

Facts.—The pencil is described as measuring 3⅝ inches long, seven-sixteenths inch wide, and one-eighth inch thick. The end of the handle portion of the pencil is a clip shape. It appears to have an eraser at the clip-shaped end. The tip of the plastic handle appears to have a thin "lead" less than one-half inch long inserted into it. Apparently, the pencil is designed for short-term usage, and when the lead wears out the pencil will be discarded.

Some of the pencils will have imprinted advertising on the side and there will not be much space to mark the name of the country of origin.

When shipped to the United States, the plasic pencils will be boxed by the gross.

Law and analysis.—Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304), requires that every article of foreign origin (or its container) imported into the United States shall be legibly and conspicuously marked to indicate to the ultimate purchaser in the United States the English name of the country of origin with certain exceptions.

Section 134.32(d) of the Customs Regulations (19 CFR 134.32(d)), allows an exception to marking requirements when the marking of the

containers in which the articles are imported and will reach the ultimate purchaser unopened, indicate the origin of the articles.

Section 134.1(d) states the ultimate purchaser is generally the last person in the United States to receive the article in the form in which it was imported. It is not feasible to state who will be the ultimate purchaser in every circumstance; however, if the imported article is distributed as a gift, the recipient is the ultimate purchaser.

Holding.—The above-described pencil is classifiable under item 760.48, Tariff Schedules of the United States (TSUS), which provides for cased pencils, and pencils not specially provided for, with duty at the rate of 25 cents per gross plus 7.5 percent ad valorem when imported from Taiwan. Pencils classifiable under item 760.48, TSUS, are not entitled to duty-free treatment under the generalized system of preference (GSP).

An exception to the country-of-origin marking requirements cannot be granted in this situation as this office is of the opinion that the subject plastic pencils appear to be giveaway advertising articles. Accordingly, the pencils will have to be individually marked as we have ruled that the ultimate purchaser of giveaway advertising articles is the donee of the articles. Taiwan is an acceptable marking.

(C.S.D. 79–407)

Export Value: Dutiability of Quota Charges

Date: May 9, 1979
File: R:CV:V DA
541890

DEAR——: Your letter of October 9, 1978, requested this office to review issues relating to the kind of proof necessary to establish that payments for quota are to be treated as nondutiable. You have also requested that we clarify Customs ruling 74–400266 of December 13, 1974.

We have been advised that there are a number of cases pending before the Customs Court addressing the issue of the evidence necessary to establish that quota payments are nondutiable. (For example C.A. 75–11–03014, 75–4–00980, 76–8–01830, 77–2–00217, and 78–3–00391.) Pursuant to Customs Regulation 177.7(b), we must refrain from issuing a ruling letter with respect to this issue. We will, however, address the remaining issue raised in your letter, clarification of Customs ruling 74–400266.

Ruling 74–400266 set forth four separate factual circumstances which could occur with respect to quota charges, and headquarters' conclusions with respect to the dutiability of the quota charges in each of the four circumstances. The second circumstance presented in the ruling is as follows:

> In the second situation, the manufacturer has his own quota allocation and decides to charge for its use. If the manufacturer only sells his merchandise at a price which includes this additional charge, then clearly this total price is the only price at which the goods are freely offered for sale. We cannot ascertain any cost to the manufacturer of using the quota allocation, and it would appear that he has merely taken advantage of the allocation system in order to enhance his own profit.

You take exception to headquarters' position, contending that it is contrary to the decision of the court in *United States* v. *Getz Brothers & Co.*, 55 CCPA 11, C.A.D. 927 (1967). It is your contention that the decision of the court in *Getz* held that all quota charges are nondutiable, citing the court's opinion at 55 CCPA 22:

> It is clear that the finding of the lower court on the issue is supported by substantial evidence that *on some occasions the export quota had to be paid for, and in other circumstances it did not.* [Italic added.]

Headquarters' position, as set forth in example 2, should be narrowly construed to the given factual circumstances of sale; that is, the manufacturer is given a free quota allocation by the Government, and sells its merchandise *only* at a price which includes an additional charge for the use of the quota. In these circumstances, the manufacturer's price, including the quota charge, is the only price at which the merchandise is freely sold or offered for sale to all purchasers as is required under export value (sec. 402(b), 402(f)(1)(A), and sec. 402a(d) of the Tariff Act of 1930, as amended). The transaction under these circumstances is analogous to transactions involving sales *only* at f.o.b. prices which includes inland freight. The Court of Customs and Patent Appeals has repeatedly held that where the only price at which merchandise is freely offered includes inland freight, such costs must be regarded as bound up in and forming an integral part of the purchase price. *United States* v. *Paul A. Straub & Co., Inc.*, 41 CCPA 209, C.A.D. 553 (1954), *Alberta Mottola* v. *United States*, 46 CCPA 17, C.A.D. 689 (1958) and *Aceto Chemical Co., Inc.* v. *United States*, 51 CCPA 121, C.A.D. 846 (1964). Therefore, quota charges incurred in transactions involving the circumstances as set forth in the second example of ruling 74–400266 must be regarded as dutiable.

(C.S.D. 79-408)

Drawback: Whether Unmarketability Due to Patent Infringement Constitutes Ground for Drawback

Date: May 10, 1979
File: DRA-1-09-R:CD:D
210188 B

Issue.—Does unmarketability due to patent infringement constitute grounds for drawback under 19 U.S.C. 1313(c)?

Facts.—An American corporation imported several sewing machines and associated parts during 1976 and 1977. In 1978, the foreign seller of the machines and parts notified the consignee that there were two patent claims against the merchandise. The merchandise was therefore apparently unsaleable in the United States and was returned to the seller after inspection by U.S. Customs and exportation under our supervision.

Law and analysis.—Section 1313(c) provides for the refund of duties, less 1 percent, upon the exportation of merchandise not conforming to sample or specification or shipped without the consent of the consignee. Unmarketability is not grounds for drawback under 1313(c) or any other provision of law. In this case, the patent infringement apparently made the merchandise unmarketable in this country, but this fact does not mean that the merchandise was not according to sample and specification, and in fact no one has so claimed.

Holding.—There being no evidence that the subject machines and parts did not conform to sample or specifications, the alleged fact of patent infringement will not support drawback, which should be denied in this case.

(C.S.D. 79-409)

Drawback: Concentrated Orange Juice for Manufacturing and Concentrated Tangerine Juice for Manufacturing; Same Kind and Quality

Date: May 15, 1979
File: DRA-1-R:CD:D NK
210419

Issue.—Whether concentrated orange juice for manufacturing is of the same kind and qualify as concentrated tangerine juice for manufacturing for substitution purposes under the drawback law, section 1313(b), title 19, United States Code.

Facts.—Domestic concentrated orange juice for manufacturing is substituted by the citrus industry for imported merchandise of the same kind and quality for use in the manufacture of citrus products such as frozen, concentrated orange juice under drawback procedures.

Applicable regulations permit 10 percent by volume of tangerine juice to be added to the manufactured product of frozen, concentrated orange juice. Therefore, it is contended that concentrated tangerine juice for manufacturing is of the same kind and quality as concentrated orange juice for manufacturing for substitution purposes. We disagree with this contention.

Law and analysis.—Concentrated orange juice for manufacturing is identified in section 146.153 of the regulations of the Food and Drug Administration (21 CFR 146.153), as the food that complies with the requirement for composition for frozen, concentrated orange juice, section 146.146, with certain exceptions. It is used in the manufacture of citrus products such as frozen, concentrated orange juice and orange juice from concentrate.

Frozen, concentrated orange juice is identified in section 146.146 (21 CFR 146.146) as the food prepared by removing water from the juice of mature oranges (Citrus sinensis) as provided in section 146.135 (21 CFR 146.135) to which may be added not more than 10 percent by volume of the unfermented juice obtained from the mature oranges of the species Citrus reticulata (tangerines).

The regulations of the Food and Drug Administration do not identify the products, concentrated tangerine juice for manufacturing or frozen concentrated tangerine juice, for comparison with the identities of the orange concentrates. However, the Department of Agriculture, in setting standards for grades of concentrated tangerine juice for manufacturing in sections 2852.2931–2941 of their regulations (7 CFR 2852.2931–2941), described it as the product obtained from sound, mature fruit of the mandarin reticulata group (Citrus reticulata). The product is composed entirely of tangerine juice and the standards do not provide for the addition of juice obtained from mature oranges of the species Citrus sinensis. Further, the standards for grades set by the Department of Agriculture for concentrated orange juice and frozen, concentrated orange juice (7 CFR 2852.2221–2231 and 2852.1581–1592) substantially differ from the standards set by the Department for grades of concentrated tangerine juice for manufacturing (7 CFR 2852.2931–2941). The concentrated juices in question have different names and characteristics and are not of the same kind and quality for substitution purposes.

When concentrated orange juice for manufacturing is designated for drawback under section 1313(b) and is used with concentrated tan-

gerine juice in the manufacture of citrus products for export, the tangerine concentrate is not eligible for drawback. The manufacturer is obligated to maintain records to show the amount of tangerine juice, if any, that was used to manufacture the exported article.

Holding.—Concentrated orange juice for manufacturing is not of the same kind and quality as concentrated tangerine juice for manufacturing.

(C.S.D. 79-410)

Prohibited and Restricted Importations: Trademark Infringement; "Konica"

Date: May 16, 1979
File: TMK 3-R:E:E
710057 SO

This ruling concerns the applicability of the prohibition set forth in section 526 of the Tariff Act of 1930, as amended (19 U.S.C. 1526), against the importation of merchandise bearing a counterfeit mark.

Issue.—Would the importation of watches bearing the mark "Konica" infringe upon the rights of the owner of the registered trademark, "Konica" which heretofore had been applied exclusively to cameras and camera accessories.

Facts.—Our New York regional office has requested redelivery of six shipments containing approximately 19,000 low quality electronic digital watches imported from Hong Kong bearing the mark "Konica" on the case and on the face. The watches were considered to be an infringement upon the trademark, "Konica," owned by Konishiruku Photo Industry, U.S.A., Inc., which has recorded their trademark with Customs for import protection. The attorney for the importer has submitted a letter to our regional office objecting to the redelivery notices. The attorneys for the trademark owner have submitted a legal brief and copies of law cases in support of their position that the watches bear a counterfeit trademark and therefore, should be seized and forfeited to the Federal Government for violation of the Customs laws. Our New York regional office submitted the matter to Customs Headquarters for consideration and advice.

The importer advances the argument that there is little likelihood of confusion in cases where dissimilar products bear similar or identical trademarks. Several court cases were cited in support of this argument. Cameras and watches are said to be as distinct from each other as were the products under scrutiny in the cases cited (women's underwear v. imported fabric; tires and minibikes v. snowmobiles; auto-

mobiles v. campers and travel trailers; boats v. automobiles; clothing v. airplanes; fluorescent lamps v. electrical appliances). The attorney for the importer also points out in his letter that cameras (and equipment) are included in class 26 of the U.S. Schedule of Classes of Goods and Services while watches are included in class 27, as "horological instruments."

The importer's attorney also pointed out that the "likelihood of confusion" is diminished because "Konica" cameras and optics are offered for sale primarily in camera shops, whereas the importer's watches are offered for sale primarily in jewelry shops or all purpose discount retail outlets. However, where both products are sold in the same store, they would, in all likelihood, be in different departments. It is also alleged that the imported "Konica" watches are not advertised, while "Konica" cameras and optics are advertised for sale to the public in large metropolitan newspapers, national magazines and specialty camera magazines. Other considerations argued in the letter submitted on behalf of the importer are that the importer would not be interested in expanding his use of the "Konica" trademark to include cameras, and Konishiroku has heretofore limited itself to cameras and related equipment. In addition, there is a great disparity in the cost of "Konica" cameras (up to $350) and watches which sell at retail for no more than $16 to $20. All of the above reasons are said to reduce the likelihood of confusion and provide "a degree of insulation" against unfair competition with Konishiroku products.

The argument is made in the trademark owner's brief, that the imported watches with "Konica" in block letters on the case and on the face must be seized by Customs and forfeited to the Government, since they bear a counterfeit mark. The "Konica" trademark for cameras and related equipment has been used continuously for 30 years throughout the civilized world. The trademark has been recorded with Customs for import protection since June 21, 1954. Through large advertising campaigns, "Konica" has become one of the most famous trademarks in the world. The "Konica" mark is said to be totally fanciful, and, therefore, a strong mark. Over 1 million cameras bearing the "Konica" trademark have been sold in the United States over the last 25 years, one for every 200 people in this country. Sales in 1978 totaled $26 million based on an advertising expense of more than $2 million. It is alleged that the imported watches and "Konica" cameras move in the same channels of trade, to the same customers, and are even sold in the same retail stores.

The vice president of the exclusive selling agent for "Konica" cameras and equipment in the United States discovered the alleged infringement and purchased one of the watches at a camera shop for $14.95. His assistant later received telephone calls from three

persons asking to have their "Konica watches" repaired. This confirmed the poor quality of the watches, since they had only been on the market for approximately 3 months at the time the repairs were requested. This is also said to be evidence of actual confusion on the part of the buyers as to the source or sponsorship of their watches. Genuine "Konica" watches have been distributed for promotional purposes to sophisticated individuals with wide contacts in the camera industry. However, these were not of the digital type, making the imported watches easy to distinguish. The secretary for the "Konica" selling agent called the importer's salesman and inquired about the availability of "Konica" watches. She was told that the "Konica" watches would be available in 2 or 3 weeks, and was quoted prices. Shortly thereafter, the Konishiroku selling agent visited the importer's premises and identified himself. He was first told that the shipment of "Konica" watches would not arrive until after Christmas. Then, after the full significance of the Konishiroku agent's visit sunk in, the importer's salesman changed his tune and said that no additional shipments were expected. This behavior is said to be evidence of a consciousness of guilt on the part of the importer.

Law and Analysis.—Section 526 of the Tariff Act of 1930, as amended (19 U.S.C. 1526), prohibits the importation into the United States of any merchandise of foreign manufacture bearing a trademark owned by a corporation created or organized within the United States, provided, a copy of such trademark registration is filed with the Secretary of the Treasury and recorded in the manner provided by regulgations (19 CFR 133.1—133.7). Any such merchandise bearing a counterfeit mark, within the meaning of section 45 of the act of July 5, 1946 (commonly referred to as the Lanaham Act, 60 Stat. 427; 15 U.S.C. 1127), imported in violation of the provisions of section 42 of the act of July 5, 1946 (15 U.S.C. 1124), shall be seized, and, in the absence of written consent of the trademark owner, forfeited for violations of the Customs laws.

The term "counterfeit" is defined in the law (15 U.S.C. 1127) as a spurious mark which is identical with, or substantially indistinguishable from, a registered mark. Since a mark identical with the registered mark "Konica" was used by the importer, it is considered to be a "counterfeit."

The trademark laws protect three interests which are present here; first, the senior user's interest in being able to enter a related field at some future time; second, his interest in protecting the good reputation associated with this mark from the possibility of being tarnished by inferior merchandise of the junior user; and third, the public's interest in not being misled by confusingly similar marks. The trademark owner furnished an example of a mark, "Ricoh," which is used

on both cameras and watches. This illustrates the fact that watches are within the product mix expected from a company that makes cameras. The use of the "Konica" mark on low quality merchandise has served to tarnish the reputation of the company and may prevent favorable consideration of any plan to expand into watches in the immediate future. The telephone calls to Konishiroku requesting watch repairs is strong evidence of actual confusion. Although evidence of actual confusion is not essential to a finding of trademark infringement, there can be no more positive proof of likelihood of confusion than evidence of actual confusion.

We note that the importer has failed to explain its intent in adopting the "Konica" mark, which was first used on January 12, 1950, by the trademark owner. The inference to be drawn from limitation is that the imitator expects to obtain a commercial advantage unfairly by creating confusion as to the source of its product, thereby obtaining the use of the good will of an established business. Where, as here, there is little to distinguish the marks themselves and the prior mark is a long-established one of which the newcomer was aware, doubts about intent are resolved against the newcomer, and a reasonable explanation of its choice is essential to establish lack of intent to deceive, especially where the prior mark is a coined or fanciful one. The newcomer's field of selection of a mark is not so limited as to require the adoption of a mark likely to cause confusion.

Differences in sales volume and methods of distribution associated with a large price variance are not conclusive and do not, in our opinion, form a proper basis for finding lack of likelihood of confusion or mistake when a confusingly similar trademark is used on imported merchandise. It is reasonable to assume that both products may be sold to the same class of people in department stores or through catalog sales methods, although the expensive "Konica" cameras may not be available in drug and discount department stores. Even though there may be a difference in the channels through which the goods are marketed, trade practices are subject to change, and hence the class of purchasers to whom the goods are sold is not considered to be a legally controlling factor. The difference in the category under which the products are listed in the U.S. Schedule of Classes of Goods and Services would also not be legally controlling.

Infringement of federally registered marks is governed by the test of whether defendant's use is likely to cause confusion, or to cause mistake, or to deceive. Where the mark itself is inherently unique or has been the subject of wide advertising, as the mark "Konica" has in this case, it is a strong trademark. It is noted that the original registration of the word "Konica" was issued on March 16, 1954, and renewed on March 16, 1974, for various photographic equipment,

including cameras and camera carrying cases. It is firmly established that the owner of a trademark which is "original," "arbitrary," "fanciful," or a "strong mark," may exclude, or prevent anyone from the use of that trademark, not only for the commodity he manufactures and sells, but for a wide variety of products. The courts have pointed out such outstanding examples of this type of trademark as "Kodak," and "Aunt Jemima." The reason for the protection so afforded is quite apparent. Distinctive and unusual names attract the consumer's attention to the source of the product he is purchasing.

The question in this case is not whether the importer has copied the registered trademark, "Konica," but whether his use of that mark on watches would be likely to cause confusion or mistake and to deceive purchasers. It is now well settled in this country that a trademark protects the owner against not only its use upon the articles to which he has applied it, but upon such other goods as might naturally be supposed to come from him. There is indeed a limit; the goods on which the supposed infringer puts the mark may be too remote from any that the owner would be likely to make or sell. But no such difficulty arises here. It is a matter of common knowledge that photographic supplies, including cameras and their accessories, and watches are sold over the same counters in many of the leading chain drugstores and department stores. The word "Konica" is a classic example of a coined or invented trademark which clearly serves to identify the source of the product, and it is not seen how harm is inflicted on anyone by preventing its use to others on any goods which are even remotely connected to photographic equipment. Where the infringement is so wanton, there is no reason to look nicely at the importer's proofs in this regard.

Holding.—Entry of the imported watches bearing the counterfeit mark "Konica" are subject to seizure and forfeiture as infringing on the registered trademark, "Konica." The trademark owner has been notified that the shipment of infringing watches is under detention and has not consented to any other disposition. Accordingly, pursuant to 19 U.S.C. 1526(e), after forfeiture, the trademarks, where feasible, will be obliterated unless obliteration would destroy the articles or be disproportionately expensive with regard to their value. After obliteration the goods will be disposed of in the following manner:

1. By delivery to Federal, State, and local government agencies who have a need for them, or
2. By gift to charitable institutions who have need for them, or
3. After 1 year from forfeiture, by selling them at public auction after first determining that no Federal, State, or local govern-

ment or a charitable institution has established a need for them, or

4. By destroying them if they are unsafe or a health hazard.

You may furnish a copy of this decision to all interested parties.

(C.S.D. 79-411)

Drawback: Return to Customs Custody Under 19 U.S.C. 1313(c)

Date: May 17, 1979
File: DRA-7-01-R:CD:D MM 210269

Issue.—Whether an importer is entitled to recover drawback under 19 U.S.C. 1313(c) on merchandise exported prior to the filing of a drawback entry and without being returned to Customs custody when failure to comply with the statute and regulations was through the fault of his agent.

Facts.—The importer contends that men's wearing apparel imported through the port of Baltimore was shipped without his consent and that the styling, colors, and sizes were not conducive to the American market. A shipping agent who was engaged to return the rejected merchandise to South Africa informed the importer the merchandise would be returned in accordance with Customs requirements. The shipper in turn told the agent that they would file the drawback entry and the goods would be loaded under Customs supervision. The merchandise was exported, however, without first being returned to Customs custody for examination and the drawback entry was filed 7 days after exportation.

Law and analysis.—Title 19, United States Code, section 1313(c), provides:

> Upon the exportation of merchandise *not conforming to sample or specification* or shipped without the consent of the consignee upon which the duties have been paid and which have been entered or withdrawn for consumption and, within 90 days after release from Customs custody, unless the Secretary authorizes in writing a longer time, *returned to Customs custody for exportation*, the full amount of the duties paid upon such merchandise shall be refunded as drawback, less 1 per centum of such duties. [Italic added.]

Section 22.32(b) of the regulations requires that each drawback entry be accompanied by documentation set forth in that section which enables Customs to verify the goods do not in fact conform to sample or specifications. Further, section 22.33(a) of the regulations provides, in part, that if the report of the receiving officer shows that

the merchandise was not returned to Customs custody within the time provided by the law, drawback shall be denied.

The statute requires not only that the merchandise be rejected and exported, but that the merchandise be shown not to conform to sample or specification or to have been shipped without the consent of the consignee. Merchandise may be defective in many respects without it qualifying for relief under section 1313(c). Therefore, its exportation without return to Customs custody precludes Customs from examining the merchandise to verify its nonconformity. Even if it were possible to make a determination of nonconformity from documentary evidence alone, the requirement of return to Customs custody for exportation within the time prescribed is a necessary condition precedent to the authorization of drawback, and, being a statutory requirement, cannot be waived by this agency regardless of whether the fault lies with the importer or with his agent.

Holding.—The request for drawback pursuant to 19 U.S.C. 1313(c) must be denied for failure to comply with the statute and regulations.

(C.S.D. 79–412)

Marking: Country-of-Origin Marking of Articles Bearing Name of U.S. City

Date: May 18, 1979
File: MAR–1–01 R:E:E
709965 HS

To: District Director of Customs, Buffalo, N.Y. 14202.

From: Director, Entry Procedures and Penalties Division.

Subject: Country-of-origin marking on certain valve bodies.

This was initiated by (name of customhouse broker) on behalf of (name of company). It concerns country-of-origin marking on valve bodies that were made in Canada, but marked with the name of a location in the United States.

Issue.—Can valve bodies which are manufactured outside of the United States, but marked with a U.S. marking, be excepted from marking requirements if the ultimate purchaser of the valve bodies knows their true origin?

Facts.—Valve bodies which were made in Canada are marked "Cleveland, Ohio, U.S.A." The U.S. company that bought the valve bodies contracted with the Canadian company to make them and, therefore, knows the origin of the valve bodies is Canada. The U.S. company will use the valve bodies as components in the manufacture and as-

sembly of automatic pressure relief valves. The "Cleveland, Ohio, U.S.A." marking will still be apparent on the completed automatic pressure relief valve. The value of the imported valve body represents approximately 14 percent of the selling price of an automatic pressure relief valve.

Law and analysis.—19 U.S.C. 1304 requires marking for every article of foreign origin imported into the United States with certain exceptions. Section 134.46 of the Customs Regulations sets forth specific marking requirements when the name of a country other than the country of origin appears on an imported article. The purpose of the specific marking requirements is to prevent the ultimate purchaser of the imported article from being misled.

In this case, the ultimate purchaser contracted with the Canadian company to have the valve bodies made. Therefore, the "Cleveland" marking is not misleading to the ultimate purchaser of the valve bodies because he knows their country of origin due to the circumstances of their importation.

However, section 134.36(b) of the Customs Regulations states that an exception from marking shall not apply to any article bearing any words described in section 134.46, such as the name of a city or a locality in the United States, which imply that an article was made or produced in a country other than the actual country of origin. This section protects against markings that are potentially misleading to the final consumer. The section is to be strictly construed.

In this case, the final consumer of the automatic pressure relief valve, of which the valve body is a component, might incorrectly conclude by seeing the valve body marked "Cleveland" that the automatic pressure relief valve was made entirely in the United States.

Because section 134.36(b) is to be strictly construed and the marking on the valve bodies is potentially misleading to the final consumer, barring unusual circumstances, there should be compliance with the specific marking requirements of section 134.46.

There is an exception, however, that could be applicable, despite the strict construction generally given to section 134.36. We believe that the hardship exception, section 134.32(o), may be justified in certain instances where unusual circumstances lead to a failure to comply with marking requirements. Section 134.32(o) excepts from marking articles which cannot be marked after importation except at an expense that would be economically prohibitive unless the importer, producer, seller, or shipper failed to mark the articles before importation to avoid meeting the requirements of the law.

Although we believe that ordinarily, articles manufactured outside the United States that have U.S. markings cannot be excepted from

marking requirements, we believe it is within the district director's discretion to allow a hardship exception in certain unusual situations. In the present case, if there is sufficient evidence presented that the incorrect marking was a one-time occurrence, that the failure to mark the articles correctly before importation was done inadvertently and not to avoid meeting the requirements of the law, and that it would be economically prohibitive to correct the marking the goods, an exception could be granted. However, more evidence would be needed for such an exception to be granted.

Holding.—The valve bodies cannot be excepted from marking requirements even though the ultimate purchaser of the valve bodies knows their true origin because the marking would be potentially misleading to a final consumer. However, the hardship exception may be granted in the district director's discretion if there is sufficient evidence presented that the incorrect marking was a one-time occurrence, that the failure to mark the articles correctly before importation was done inadvertently and not to avoid meeting the requirements of the law, and that it would be economically prohibitive to correct the marking on the goods.

(C.S.D. 79–413)

Country-of-Origin Marking: Shotgun Marked With Country of Origin and U.S. Address of the Importer on Opposite Sides of the Shotgun Barrel

Date: May 18, 1979
File: MAR–2–05:R:E:E
710388 AH

This is in reference to your letter of April 12, 1979, concerning proposed country-of-origin markings to be inscribed on Winchester shotguns made in Japan.

Issue.—Whether or not the country-of-origin marking of the shotguns in question meets the requirements of 19 U.S.C. 1304.

Facts.—A schematic showing the proposed marking layout and modifications of two shotguns was submitted for review as to conformity with 19 U.S.C. 1304.

The words "Made in Japan" will be die sunk on the right side of the barrel while the left side will bear other markings, including the U.S. address of the importer.

Law and analysis.—Section 134.46 of the Customs Regulations (19 CFR 134.46) provides that in any case where the words "U.S." or "American" the letters "U.S.A.," any variation of such words or letter

or the name of any foreign country or locality other than the country or locality in which the article was manufactured or produced appear on an imported article or its container, a marking such as "Made in" or "Product of" followed by the name of the country of origin must appear in proximity thereto. This requirement is normally construed to mean the same side or surface.

Holding.—In this case, we are of the opinion that the country-of-origin marking is acceptable for purposes of 19 U.S.C. 1304, since it is in reasonable proximity to the marking containing model and importer's address information, although on the opposite side of the barrel.

(C.S.D. 79–414)

Temporary Importation Under Bond Entry: Substitution of TIB Entry for Consumption Entry Previously Filed

Date: May 21, 1979
File: CON–9–11–R:CD:D
209927 MM

Issue.—Whether a temporary importation under bond entry can be substituted for a consumption entry.

Facts.—A caboose carrying technical representatives and special scientific measuring apparatus was entered under item 864.40, Tariff Schedules of the United States. The entry was rejected because no authority had been obtained for such an entry. A consumption entry was subsequently filed and permission is requested to substitute a TIB entry for the consumption entry filed. The caboose has since been exported.

Law and analysis.—Section 10.31(g), Customs Regulations, provides for substitution of a TIB entry for a previously filed entry if the original entry was filed as a result of a clerical error, mistake of fact, or inadvertence, within the meaning of 19 U.S.C. 1520(c)(1). The facts presented do not explain why prior authority for the proposed TIB entry was not obtained, and it seems possible that failure to obtain the authority to file a TIB entry was due to negligent inaction or a misconstruction of the law.

However, if failure to secure the required authority for filing the TIB entry comes within the purview of 19 U.S.C. 1520(c)(1) consideration will be given to any arguments presented.

Holding.—Based on the facts presented the request to substitute a TIB entry for the consumption entry filed must be denied.

(C.S.D. 79–415)

Carrier Control: Whether the Use of a Foreign-Built Vessel to Conduct Funerals at Sea Violates the Coastwise Laws

Date: May 22, 1979
File: VES–3–02–R:CD:C
103964 MKT

In response to your letter of April 18, 1979, we have reviewed the permissibility of using a foreign-built sailboat to conduct funerals at sea. This activity raises the legal question of whether a foreign-built, U.S. licensed vessel may transport passengers for hire.

As we understand the facts, you, the owner of a foreign-built vessel of 15 net tons, licensed as a yacht in the United States, desire to use the vessel to conduct funerals at sea at which the captain or a clergyman will read a religious service to the funeral guests and the cremated ashes of the deceased will be scattered upon the water. You would also like to provide skippered charters for tourists and scuba divers.

As you know, a vessel licensed as a yacht may engage only in pleasure activities. The vessel may engage in commercial activities if registered pursuant to title 46, United States Code, section 11. It is our understanding that any register issued by the Coast Guard, which is solely responsible for vessel documentation, will restrict a foreign-built vessel from engaging in the coastwise trade. The vessel will also be subject to all safety and other regulations of the Coast Guard.

The coastwise trade is generally defined as the transportation of passengers or merchandise between points in the United States embraced within the coastwise laws including points within a habor, or merchandise for any part of that transportation between those points. The Customs Service has previously ruled that a transportation of passengers entirely within territorial waters is prohibited by the coastwise laws. However, a foreign-built vessel may transport passengers from the United States to a place on the high seas provided that the vessesl returns to the place of embarkation without landing passengers at a second coastwise point. A passenger is any person carried on a vessel returns to the place of embarkation without landing passengers ship, or business of a vessel.

Under this definition, we would not consider the captain and the clergyman to be passengers since the former is connected with the ownership, navigation, and business of the vessel and the latter is connected with her business. However, we would consider funeral guests and any tourists or divers to be passengers whom a foreign-built vessel could not transport. Thus funerals at sea and the skippered

charters you contemplate are permissable only if your vessel proceeds to a point on the high seas and returns to its place of embarkation without landing passengers at a second point in the United States embraced within the coastwise laws.

(C.S.D. 79–416)

Bonds: Modification and Authentication of Automated Bond Information System (ABIS) Bonds; Bond Riders

Date: May 23, 1979
File: BON–1–R:CD:D
210230 WR

Issue.—Whether a corporate principal must use the same method for authenticating a bond and bond rider that are filed as one package under the automated bond information system (ABIS).

Facts.—A corporate principal intends to file an ABIS bond and one or more ABIS bond riders as one package. Under section 113.34, Customs Regulations (19 CFR 113.34) there are a number of acceptable methods of authenticating the execution of the signature which binds the corporation. It has been brought to the attention of this headquarters that Customs officers have accepted ABIS bond and bond rider packages in which only the bond itself is authenticated as required by 19 CFR 113.34. In those instances, the bond riders have been signed by a corporate officer without execution of the certificate of corporate principal or other acceptable method of authenticating the signature of the person signing on behalf of the corporate principal.

Law and analysis.—Courts have found that an insurance contract with an attached rider have constituted a single agreement. However, in those cases, the policy and the attached rider referred to each other, or the rider was incorporated into the policy by a reference in the policy. *Bluewaters, Inc.* v. *Boag*, 320 F. 2d 833 (1st Cir. 1963) and *Reliance Ins. Co.* v. *Orleans Parish School Board*, 322 F. 2d 803 (5th Cir. 1963), cert. den. 377 U.S. 916.

Unlike those situations, the ABIS bonds do not refer to the bond riders. Although a rider may refer to a bond, it does not become part of the contract simply by being fastened to the bond. However, an intent to treat the rider as being part of the bond can be shown by having the parties to the bond sign the rider.

It is the policy of the Customs Service to allow modification of an ABIS bond at any time during the effective period of the bond by filing an approved rider and bond transcript, Customs form 53, under

the provisions of section 113.26, Customs Regulations (19 CFR 113.26). A rider filed during the bond period becomes effective 60 days after filing and terminates when the underlying bond terminates.

Because a rider may be filed at any time during the effective period of the bond and the addition of the rider modifies the underlying bond, adding a rider to a bond creates a new contract. Customs form 53 is used to introduce the filed bond or bond rider into the data processing system; it does not become part of the bond contract. The ABIS computer printout does not show how the bond or any rider was signed. Therefore, it is necessary that all bonds and bond riders be properly signed and authenticated whether the bond and a rider is filed separately or together.

So long as the bond and rider are properly signed and authenticated the principal need not follow the same method whether the bond and rider are filed together or separately. A principal may have the bond executed by a corporate officer following the procedure set forth in 19 CFR 113.34(c)(1) and a rider executed by an attorney in fact under 19 CFR 113.34(d).

Holding.—An ABIS bond may be modified at any time during its effective period by the filing of an ABIS bond rifer with a bond transcript at the port where the underlying bond is filed.

Because an ABIS bond may be modified without the execution of an entire new bond, it is necessary for each bond and bond rider to be signed and authenticated as required under 19 CFR 113.34. So long as one of the methods set forth in 19 CFR 113.34 is used, it is not necessary that the same method be used for each bond and bond rider when filing a bond and bond rider at the same time.

(C.S.D. 79–417)

Country-of-Origin Marking: Giveaway Advertising Balloons

Date: May 24, 1979
File: MAR–2–05:R:E:E
710238 AH

This ruling concerns the country-of-origin marking requirements applicable to advertising balloons.

Issue.—Whether the balloons in question are required to be individually marked to indicate the country of origin.

Facts.—The balloons are manufactured in Canada and bear the advertising message (name of restaurant). The importer proposes to legibly and conspicuously mark the outer containers with a legend such as "Product of Canada," or equivalent wording. It appears,

however, that the balloons will be given away individually as advertising items.

Law and Analysis.—Section 304 of the Tariff Act of 1930, as amended (19 U.S.C. 1304) requires that every article of foreign origin (or its container) imported into the United States shall be marked in a legible and conspicuous manner to indicate the English name of the country of origin to the ultimate purchaser in the United States, with certain exceptions.

The "ultimate purchaser" of an imported article is broadly defined in 19 U.S.C. 1304(a) as the last person in the United States who will receive the article in the form in which it was imported.

In the case of various kinds of "giveaway" articles, such as shopping bags, ballpoint pens, book matches, and other articles which usually carry an advertising message, it is required that such articles be individually marked to indicate the country of origin, as the donee is deemed to be the "ultimate purchaser" of the article within the meaning of 19 U.S.C. 1304(a).

Holding.—After a careful analysis of the regulations relative to the "ultimate purchaser" and giveaway articles, it is the opinion of this office that the balloons must be individually marked to indicate the country of origin pursuant to 19 U.S.C. 1304.

(C.S.D. 79–418)

Foreign-Trade Zones: Whether Production Equipment May Be Brought into a Foreign-Trade Zone Free of Duty

Date: May 24, 1979
File: FOR–2–04–R:CD:D
210177 WR

Issue.—May production equipment be brought into a foreign-trade zone free of duty?

Facts.—A firm intends to bring production equipment from Japan to a foreign-trade zone where it will be installed for use in producing articles.

Law and analysis.—Production equipment is not merchandise for the purposes of the Foreign Trade Zone Act (19 U.S.C. 81).

Although 19 U.S.C. 81c states that merchandise of every description may be brought into a zone without being subject to the Customs laws, the act does not define "merchandise". It seems clear that not every article can be termed "merchandise". Webster's Third New International Dictionary defines the term as "the commodities or goods that are bought and sold in business".

In a number of cases the courts held that the intended use of a given article in the hands of the owner was important to the determination on whether the article was merchandise. In an early Federal case, *U.S.* v. *One Sorrel Horse*, 27 Fed. Cas 315 (No. 15, 953) (D. VT. 1847), the court held that while a horse could be an object of commerce, a horse brought in as an instrument of conveyance on a journey was not brought in as merchandise. In the case of *U.S.* v. *Fry*, 48 F. 713 (E.D. La. 1892) the court held that a compass from the lifeboat of a steamship which was stolen by a seaman and taken on shore was not merchandise within the meaning of R.S. 2873 which prohibited the landing of merchandise without a permit. In *U.S.* v. *Mattio*, 17 F. 2d 879 (9th Cir. 1927) the court held that section 460 of the Tariff Act of 1922, the predecessor to present 19 U.S.C. 1460, was intended to cover merchandise and that articles of personal adornment, being noncommercial in nature, did not constitute merchandise within the meaning of that law. In a bankruptcy action, *In re Handerson* 3 F.S. 92 (S.D.N.Y. 1933) the court held that a mortgage covering specified machinery and equipment used in a garage was not void under the New York lien law because articles of that sort could not be classified as a stock of merchandise or as merchandise and fixtures.

Various State court actions have applied the same reasoning. In *Northrup* v. *P. W. Finn Const. Co.*, 103 A 544 (Sup. Ct. Pa. 1918) the court in a bankruptcy proceeding held that construction equipment used by a construction company was not covered by the bulk sales law as merchandise. In *Smith* v. *Boyer* 112 S.E. 71, 119 S.C. 176 (1922), the court held that articles used in and around a butcher's shop were not merchandise. In a suit under the Fair Labor Standards Act of 1938 (Then 19 U.S.C. 207) the court held, in *Pedersen* v. *J. F. Fitzgerald Const. Co.*, 18 N.Y.S. 2d 920, 173 Misc 188 (1940), that the abutments and substructures of bridges could not be considered to be merchandise. The court, in *Johnson Transfer & F. Lines* v. *American Nat'l. Fire Ins. Co.* 79 S. W. 2d 587 (Sup. Ct. Tenn. 1935) held that while a turbine would not be considered merchandise, if handled by a country store, it would fit that definition when handled and shipped by the (company) which was in the business of selling of such machinery. Finally, in the case of *Wilkinson-Beane, Inc.* v. *C.I.R.*, 420 F. 2d 352 (1st Cir. 1970) in a discussion of cases defining merchandise, the court found that the common denominator of the decisions is whether the items in issue were held for sale.

Against the background of both the common meaning of merchandise and the judicial acceptance of the meaning, it is possible to consider the intent of Congress in the Foreign-Trade Zones Act with respect to the meaning of merchandise. In the hearings before a subcommittee of the Committee on Ways and Means on H.R. 3657, 73d

Cong. (March 6, and 7, 1934) Congressman Celler stated the intended purpose of the proposed foreign-trade zones was to encourage the re-export trade (hearings), p. 5. Moreover, it is clear that Congressman Celler did not believe capital goods, such as equipment used to construct a railroad into a zone, would be free of duty unless specifically provided for in the act (see the discussion of the Copenhagen Free, Port Charter which was urged as a model by Mr. Celler, hearing, pp. 16–25, particularly art. 6 of that charter). In the hearing before the Committee on Ways and Means on H.R. 6159 and H.R. 6160, 80th Cong. May 10, 1948, Mr. Celler in advocating amendments to the 1934 act, stated at page 12:

> No question of tariff is involved here. Whether a man is a high protectionist or a low-tariff man, there is no conflict between the principle of the foreign-trade zone in our tariff laws. The Foreign Trade Zone Act synchronizes with the tariff law. The former is set up to "expedite and encourage foreign commerce," and the latter is set to provide revenue and to regulate commerce with foreign countries, to encourage industries, and protect American labor.

Mr. Celler who was the leading advocate of both the 1934 act and the 1950 amendment to that act must have known the intended scope of those provisions. If a manufacturer could bring in machinery duty free to be used in a zone to process other goods to be sold in competition with an American industry there would be a conflict for a high protectionist of American industry. However, Mr. Celler stated that the act posed no conflict. Accordingly the act's language must be read with Mr. Celler's stated limits in mind.

The 1950 amendment of section 3 of the act to allow manufacturing was clearly designed to avoid legal conflicts to determine whether the process was a "manipulation" or a "manufacture". See for example, the hearings on H.E. 6159 and 6160 (1948) pages 5, 14, 15, 19, 26, 34, 36, 40, and 46.

It is noteworthy that general headnote 1 of the revised tariff schedules (19 U.S.C. 1202) refers to all "articles" imported into the United States rather than to all "merchandise" since the former is a more inclusive term. Given the common understanding of the term "merchandise", we believe that Congress deliberately used that more limited term in the Foreign-Trade Zones Act to avoid this very conduct.

The very action of listing the permitted operations rather than simply stating that foreign merchandise could be admitted free of duty was purposeful. The list does not permit an article to be brought into a zone, free of duty, to be used as production equipment to make other articles. The clear intent to limit the scope of permitted operations is shown in the restriction on the term "manufactured" by the

language "* * * except as otherwise provided in this chapter * * *," and in the discussion of the fifth proviso to section 3 in Senate Report No. 1177, 81 Cong. (September 26, 1949).

Finally, there have been several congressional proposals to amend the Foreign Trade Zones Act to permit the duty-free entry of items imported into foreign-trade zones for use in the production of goods to be exported. See S. 2754, 92d Cong. S. 4119, 92d Cong. and S. 2874, 95th Cong. None became law. In the case of S. 2874, the Department of State opposed the bill because it considered the bill to provide a bounty which, if enacted by another country, would be subject to countervailing duties, and would disrupt U.S. trade policy. The very act of proposing the amendment, however, shows that Congress believed the existing law denied duty-free admission.

Holding.—Production equipment may not be brought into a foreign-trade zone free of duty.

The request for a ruling cited *Hawaiian Independent Refinery* v. *U.S.*, C.D. 4777 (1978). However, the issue in this case did not involve capital equipment which would physically move through the Customs territory. The ruling in that case will be applied strictly to that fact situation.

(C.S.D. 79–419)

TEMPORARY IMPORTATION UNDER BOND: DESTRUCTION OF SCRAP METAL IN LIEU OF EXPORTATION

Date: May 25, 1979
File: CON–9–09–R:CD:D
210371 NM

Issue.—Whether scrap metal which is buried in a landfill is considered destroyed for purposes of 19 U.S.C. 1557(c).

Facts.—A metal building was entered under a temporary importation bond for testing purposes under item 864.30, Tariff Schedules of the United States. The building is to be erected at a research facility to test the roof system. A plastic enclosure will be placed over the entire structure to create a vacuum bringing about the collapse of the building which will enable the company to determine the stress points. Upon completion of the testing the company proposes to take the pieces to a public landfill to be buried under Customs supervision to satisfy cancellation of the temporary importation bond.

Law and analysis.—Title 19, United States Code, section 1557(c), provides in part that merchandise entered under bond, under any provision of law, may be destroyed under Customs supervision, at the request and at the expense of the consignee, in lieu of exportation.

Section 158.43 of the Customs Regulations sets forth the procedure for destroying merchandise under Customs supervision.

In the case of *American Gas Accumulator Co.* v. *United States*, T.D. 43642, 56 Treas. Dec. 368 (1929), the Customs Court held that for the purpose of cancelling temporary importation bonds, the term "destroyed" means that the articles imported no longer are articles of commerce. "In other words, if articles were destroyed to such an extent that they were only valuable in commerce as old scrap they still would be articles of commerce to which duty attaches upon importation, and therefore, could not be said to have been destroyed." In view of this we have held that scrap could be considered destroyed as an article of commerce, by burying it, under Customs supervision, in a landfill, such that the cost of extracting the scrap would exceed its value.

Holding.—Scrap metal so buried that its recovery would be economically infeasible is considered destroyed for purposes of 19 U.S.C. 1557(c).

(C.S.D. 79–420)

Customs-Bonded Warehouse: Whether Puerto Rican Rum May Be Stored in a Customs-Bonded Warehouse Pending Exportation

Date: May 29, 1979
File: WAR–1–03–R:CD:D
210219 WR

Issue.—Whether rum bottled in Puerto Rico and resold for export may be stored in a Customs-bonded warehouse pending exportation.

Facts.—The Commonwealth of Puerto Rico controls the operations of distilled spirits plants in the Commonwealth rather than the U.S. Bureau of Alcohol, Tobacco and Firearms. Exported rum from a Puerto Rican distilled spirits plant is not entitled to drawback under section 5062 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 5062).

Law and analysis.—The relevant statutes dealing with storage in Customs-bonded warehouses are sections 311, 312, and 557 of the Tariff Act of 1930, as amended (19 U.S.C. 1311, 1312, and 1557) and section 5066 of the Internal Revenue Code of 1954, as amended (26 U.S.C. 5066). Under 19 U.S.C. 1311, a product of a bonded manufacturing warehouse (class 6) may be transferred to another bonded warehouse for storage pending exportation. Under 19 U.S.C. 1312, a product of a bonded smelting and refining warehouse (class 7) may be transferred to another bonded warehouse for storage pending withdrawal for consumption or exportation. Under 19 U.S.C. 1557, any

merchandise subject to duty, other than perishables and most explosives, may be deposited in a bonded warehouse. Under 26 U.S.C. 5066, distilled spirits bottled in bond for export under 26 U.S.C. 5233, or distilled spirits returned to the bonded premises of a distilled spirits plant under 26 U.S.C. 5215, may be transferred to and stored in a Customs warehouse pending exportation.

Rum manufactured in a distilled spirits plant controlled by the Commonwealth of Puerto Rico does not come within the provisions of either 19 U.S.C. 1311 or 19 U.S.C. 1312. Because Puerto Rico is within the Customs territory of the United States, rum made in Puerto Rico is not merchandise that is subject to duty under the Tariff Schedules of the United States (TSUS) (19 U.S.C. 1202). General headnote 2, TSUS, and section 401(h) of the Tariff Act of 1930, as amended (19 U.S.C. 1401(h)). Therefore, rum from Puerto Rico is not entitled to be warehoused under 19 U.S.C. 1557.

Section 5066 of the Internal Revenue Code concerns products of distilled spirits plants that are under control of the U.S. Bureau of Alcohol, Tobacco and Firearms, and which are entitled to drawback of internal revenue taxes. In the present case, there is no internal revenue tax assessed on Puerto Rican rum by the United States. Consequently, storage of that rum in a Customs-bonded warehouse is not permitted.

Holding.—There is no basis on which to permit the storage of Puerto Rican rum in a Customs-bonded warehouse since the rum is not subject to U.S. internal revenue taxes or U.S. duty.

(C.S.D. 79–421)

Aircraft Repairs: Entry for Foreign Repairs; Airport of First Arrival

Date: May 30, 1979
File: AIR–4–07–R:CD:C
103981 JM

This is in reference to your letter of October 2, 1978, concerning aircraft repairs.

Your equest that (airline) be allowed to file one entry for each month on the appropriate forms with a tender of duties at J. F. K., rather than filing separate entries at all the various ports involved throughout the country. Section 6.7(d), Customs Regulations, provides that entry for foreign repairs shall be made on the first arrival of the aircraft in the United States subsequent to repairs made abroad and that entry shall be made as provided by section 4.14, Customs Regulations. Neither the underlying statute nor the applicable regulation allows

the making of a consolidated monthly entry or entry of the repairs at other than the airport of first arrival. Accordingly, your request to make an entry each month at J. F. K. is denied and entries for foreign repairs to the aircraft must be made at the airport of first arrival as provided by sections 6.7(d) and 4.14, Customs Regulations.

While the orginal entry for the repairs must be filed at airport of first arrival, we realize that it is possible that all information concerning foreign repairs will not be available at the time the entry is filed at the airport of first arrival and we have no objection to filing this information with the Regional Commissioner of Customs in New York. When submitting such information to New York, you should furnish the date and airport of first arrival and the aircraft repair entry number.

After stamping the general declaration in good faith to show entry not required by section 6.7(e), Customs Regulations, for equipment purchased or repairs made to an aircraft while in a foreign country, if the airline discovers that dutiable equipment was purchased or repairs made, entry covering the equipment or repairs shall be made at the airport of first arrival at which the general declaration was filed.

(C.S.D. 79–422)

Classification: Ornamental Boxes of Semiprecious Stone; Presumption of Correctness

Date: December 10, 1979
File: CLA–2:R:CV:MSP
055387 LD

This ruling concerns your request for internal advice number 00153, on the classification of certain articles of semiprecious stone imported from Italy (IA No. 153/78).

Issue.—The issue presented is whether these ornamental boxes of semiprecious stone are classifiable under the provision for artciles of marble, breccia, and onyx, not specially provided for, in item 514.81, Tariff Schedules of the United States (TSUS), dutiable at the rate of 10.5 percent ad valorem, or as articles of semiprecious stone, not specially provided for, in item 520.61, TSUS, dutiable at the rate of 21 percent ad valorem.

Facts.—The subject artciles are Italian manufactured ornamental boxes comprised of semiprecious stone. The manufacturer's commercial invoice describes the boxes as jasper hemitite and tiger eye with tiger iron. No additional descriptive literature accompanied this request.

The merchandise was considered classifiable in item 520.61, Tariff

Schedules of the United States (TSUS). The importer contends, however, that since similar pieces imported through another port were placed under item 514.81, TSUS, these articles should be accorded like treatment.

Law and analysis.—The resolution of the issue presented essentially requires a factual determination regarding the component material in chief value of the boxes.

Since the tariff classification assigned by port officials at the time of entry is accorded a presumption of correctness, it is incumbent upon the importer to demonstrate that the original classification was erroneous and that the classification which he advances is correct. In order to substantiate his claim he should submit a breakdown of the articles' component materials, a corrected commercial invoice, or whatever other illustrative material may be necessary in order to enable port personnel to make this determination. The mere assertion that similar merchandise has been entered through other ports at lower rates of duty is not sufficient evidence to require you to alter your original opinion.

Accordingly, you should request additional detailed information concerning the composition of the merchandise from the importer. If this material is not forthcoming or is not sufficient to substantiate the importer's claim, the entries may be liquidated under item 520.61, TSUS.

(C.S.D. 79–23)

Special Appraisement: Repairs or Alterations Under Item 806.20

Date: December 20, 1979
File: CLA–2:R:CV:MSP
055400 EM

To: District Director of Customs, El Paso, Tex. 79985.
From: Director, Classification and Value Division.
Subject: Internal Advice No. 134/78.

This ruling concerns a clarification of the applicability of item 806.20, TSUS, to certain automobiles.

Issue.—The issue presented concerns the applicability of item 806.20, TSUS, to panel vans and trucks that are exported to Mexico for installation of rear passenger seats and rear side view windows.

Facts.—This clarification is being sought particularly in view of the fact that new car dealers are finding this practice of sending panel vans and trucks to Mexico for the modification work to be performed there more advantageous than ordering these vehicles direct from the factory.

Law and analysis.—Item 806.20, TSUS, provides for an import duty to be assessed upon the value of repairs or alterations made on articles exported for that purpose. However, the application of this tariff provision is precluded in circumstances where the operations performed abroad would result in new or commercially different articles differing in name, value, appearance, size, shape, and use from the articles that had been exported.

In the circumstances described, the modifications performed on the exported vans and trucks in Mexico would clearly exceed the meaning of the term "repairs or alterations" within the contemplation of the tariff provision. Although not clearly revealed as to whether the passenger seats would extend from front to rear, presumably the foreign modifications are used to fully equip vehicles exported as trucks for later use as passenger vehicles.

Not only would such a practice bring about a change in the classification under the tariff schedules, since trucks are classified differently than passenger vehicles, but passenger vehicles are generally dedicated for a different selling market than trucks. The result is a commercially different article newly designed for the transport of passengers and their gear instead of cargo generally handled by trucks. For changes in the use of merchandise over that which prevailed earlier, see C.D. 4755.

Accordingly, on the basis of the foregoing, as the imported vehicles would not be eligible for item 806.20 tariff relief, and as there are no other provisions of the tariff schedules under which a partial exemption from the payment of duty could be granted, the imported vehicles would be subject to duty under the provision for passenger vehicles in item 692.10, TSUS.

(C.S.D. 79–424)

Classification: Unfinished Firebrick For Use in Electric-Arc Furnaces

Date: January 12, 1979
File: CLA–2:R:CV:MSP
055369 LD

This ruling concerns your request for internal advice, No. 000111, on the classification of certain types of PMT firebrick imported from Japan (IA No. 111/78).

Issue.—The issue presented is whether the firebrick as imported, in an unfinished state, is classifiable under the provision for magnesite bricks in item 531.24, Tariff Schedules of the United States (TSUS), dutiable at the rate of 0.19 per pound plus 2.5 percent ad

valorem, or under the provision for articles of mineral substances, not specially provided for, not decorated, in item 523.91, TSUS, dutiable at the rate of 7.5 percent ad valorem.

Facts.—The subject firebrick is designed to line electric-arc furnaces in steel mills. In its imported condition, the merchandise is formed into brick shapes of various sizes. It is not fired, however, until it has been installed in a furnace in the United States and heated to a point beyond pyrometric cone 020 at the time that the furnace is first used. At the request of counsel for the importer, a further description of the merchandise is omitted.

The articles were entered under item 531.24, TSUS, on November 26, 1976. They were later reclassified in item 523.91, TSUS, on the basis of a laboratory report which determined that the merchandise did not meet the definition of ceramic articles as provided in schedule 5, part 2, headnote 2(a), TSUS. This request for internal advice was thereafter initiated.

Law and analysis.—General Interpretative rule 10(h) of the tariff schedules states:

> (h) unless the context requires otherwise, a tariff description for an article covers such article, whether assembled or not assembled, and whether finished or not finished.

By judicial decision, this rule has been interpreted to provide that, absent qualifying language indicating that only finished articles are to be classified thereunder, a provision of the tariff schedules may include an article which has been so advanced toward its final form as to be dedicated to that purpose.

Here, the merchandise has been shaped into forms in preparation for assembly into electric-arc furnaces. In its finished form it is designed to serve as refractory lining and to withstand temperatures above 2,600°. The only step remaining to complete the articles is the firing which is accomplished after the furnace is first heated. It appears that the merchandise as imported is sufficiently advanced toward its final form so as to be dedicated to use as a refractory article, and that at this stage of manufacture, the merchandise is unsuitable for any other purpose. Accordingly, the merchandise may be classifiable in item 531.24, TSUS, subject to compliance with the pertinent provisions of the tariff schedules as enumerated below.

Schedule 5, part 2, headnotes 1 and 2(a), TSUS, provide:

> 1. This part covers ceramic wares, and articles of such wares and, in addition, certain unshaped refractory material (subpart A) closely related thereto.
>
> 2. For the purposes of the tariff schedules—
>
> (a) a "ceramic article" is a shaped article having a glazed or unglazed body of crystalline or substantially crystalline structure, which body is composed essentially or inorganic non-

> metallic substances and either is formed from a molten mass which solidfies on cooling, or is formed and subsequently hardened by such heat treatment that the body, if reheated to pyrometric cone 020, would not become more dense, harder, or less porous, but does not include any glass article.

Schedule 5, part 2, subpart A, headnote 3, TSUS, further provides:

> 3. For the purposes of this subpart, "a refractory article," whether shaped or not shaped, is one having a bulk density over 75 pounds per cubic foot and designed to be used to resist temperatures above 2,600° F. A shaped refractory article has special properties of strength and resistance to thermal shock and may also have, depending upon the particular uses for which designed, other special properties such as resistance to abrasion and corrosion.

In addition, the "Summaries of Trade and Tariff Information," schedule 5, volume 3, TC Pub. 453, Washington, D.C. (1971), at 23, indicates that magnesite brick are those refractory articles in which magnesite is the component material of chief weight.

Based on the above, we are of the opinion that in order for the merchandise to be classifiable in item 531.24, TSUS, it must be in chief weight of magnesite and satisfy the requirements of headnotes 2(a) and 3, TSUS, supra.

Counsel for the importer has suggested that schedule 5, part 2, headnote 1, TSUS, is inapplicable to the classification of this merchandise. He states, "It is our belief that that headnote has nothing to do with TSUS item 531.24. Unlike the articles in subparts B and C, the articles in subpart A are not restricted by their terms to ceramic articles." We cannot agree.

According to the *Tariff Classification Study Submitting Report*, U.S. Tariff Commission, Washington, D.C. (1960), at 9:

> *4. Interpretive headnotes; noninterpretive footnotes*
>
> An important feature of the proposed tariff schedules not found in the existing schedules is a system of interpretive headnotes which specify certain special rules of interpretation, define important terms, prescribe special procedures, and, in general, clarify the relationships between the various schedules, parts, and subparts and the classification descriptions incorporated therein * * * The effort has been made to place these headnotes in closest proximity to the classification descriptions to which they relate. Thus, a headnote, relating exclusively or primarily to classification provisions in a subpart is made a subpart headnote, a headnote relating exclusively or primarily to classification provisions in a part is made a part headnote, a headnote generally applying to classification provisions within various parts of a schedule is made a schedule headnote, and the most general provisions of all are made general headnotes to the entire set of schedules.

The "Tariff Classification Study," schedule 5, part 2, (1960), at 77, further states:

> It will be noted that there are included in the part 2 headnotes many of the headnotes, with some modification, that were originally included as headnotes to subpart C of part 2. These headnotes have general application throughout the schedule but were of more critical importance in relation to the articles in subpart C and were developed in conjunction therewith. It seems more appropriate, however, in view of their general applicability for them to be included as headnotes to the entire part.
>
> The term "ceramic article", as used and defined in schedule 5, has a meaning differing only slightly from the classical definition of the word. *It covers primarily refractory products*, ceramic construction products, and pottery and related products, all of which have long been concerned with the use of clay. Because of changing technology, however, many ceramic products are made without clay, for example, pure oxide articles, devitrified glass articles, and some cermets. [Italic added.]

The language quoted clearly indicates that schedule 5, part 2, headnote 1, TSUS, is applicable to the merchandise in question.

Since it appears that due to its unique nature, the merchandise as imported may not be suitable for heat analysis, the importer may submit a sample of the finished product to be tested in accordance with the guidelines set forth in this letter. The test should establish whether the articles qualify as heat insulating or refractory bricks and identify the magnesite content.

(C.S.D. 79–425)

Classification: Proper Basis for Classifying Decalcomanias in Ceramic Colors

Date: January 25, 1979
File: CLA–2:R:CV:MC
055362 PG

Re: Internal Advice Request 131/78.

AREA DIRECTOR OF CUSTOMS,
New York Seaport,
New York, N.Y. 10048.

DEAR SIR: This request for internal advice concerns the basis for determining the tariff classification of decalcomanias in ceramic colors.

Issue.—Whether the tariff provisions for decalcomanias in ceramic colors are end use provisions or eo nomine designations.

Facts.—Schedule 2, part 5, Tariff Schedules of the United States (TSUS), covers decalcomanias, and provides, in pertinent part:

> Decalcomanias (except toy declacomanias):
> In ceramic colors:

273.65 Weighing not over 100 pounds per 1,000 sheets (on the basis of 20 by 30 inches in dimensions)
273.70 Weighing over 100 pounds per 1,000 sheets (on the basis of 20 by 30 inches in dimensions)
Other:
273.75 Not backed with metal leaf
273.80 Backed with metal leaf

A headquarters decision dated March 23, 1978 (CIS No. 3600–340, Legal Determination 3611–321), concerned the proper classification, for tariff purposes, of heat transfer paper with a design to be transferred by heat and pressure to clothing or textile articles. In this decision, it was held:

> Since the article is not used in transferring designs to ceramic ware, and since it contains no backing, it is classifiable as other decalcomanias, in item 273.75, Tariff Schedules of the United States * * *

The aforecited decision apparently is based upon the concept that the tariff provisions for decalcomanias in ceramic colors are end use provisions (i.e., that if the article is not used in transferring designs to ceramic ware, it is not classifiable under the provisions for decalcomanias in ceramic colors), rather than eo nomine designations. This concept, however, is incorrect, for reasons enumerated below.

Law and Analysis.—In the Tariff Schedules of the United States, merchandise may be classified and designated in numerous ways: eo nomine (by its own specific name); according to use; in general terms or words of general description; and by composition. The aforecited headquarters decision raises the question of whether the tariff provisions for decalcomanias in ceramic colors are end use provisions or eo nomine designations. In order to resolve this question, it might be helpful to examine the legislative history of the Tariff Schedules. In volume 1 of the "Tariff Classification Study" (C.I.E. 1/64), it is stated:

> Decalcomanias are imprinted on paper, usually in colored pigments, which may be transferred from the paper to a permanent surface. Ceramic decalcomanias are for use in transferring designs to pottery and other ceramic ware and are usually printed on a duplex type of paper.

Whereas decalcomanias in general are imprinted on paper in colored pigments, ceramic decals are imprinted on paper in ceramic colors, which are subsequently heat-set. The method for distinguishing between decalcomanias in ceramic colors with those not in ceramic colors is based on the composition of the materials. Decalcomanias in ceramic colors are composed of calcined mixtures of metallic oxides and frit which when properly applied by means of heat become part of the ceramic ware. Decalcomanias not in ceramic colors are composed

of organic and inorganic pigments that either burn off after applying heat or else form a powdery mass without penetration of the ceramic ware.

That the specific statutory language designates decalcomanias "in ceramic colors" rather than decalcomanias "chiefly used for transferring designs to ceramics," for example, suggests that items 273.65 and 273.70, TSUS, were intended as eo nomine designations, rather than as use provisions. Past administrative practice has been to treat the decalcomania provisions of schedule 2, part 5, TSUS, as eo nomine designations. Hence, where the printing is in ceramic colors the practice has been to classify the decalcomanias in items 273.65 and 273.70, TSUS, regardless of intended or end use (MCS 484.42 H dated December 10, 1969; TC 484.42 L dated July 11, 1969). On the other hand, where the printing is not in ceramic colors, decalcomanias consistently have been classified as "other decalcomanias" in items 273.75 and 273.80, TSUS (CLA–2:R:CV:MC 051332 AL, dated June 24, 1977; CLA–2:R:CV:MC 029878 AB dated September 24, 1973; CIE 2310/66; CIE 1380/66).

The proposition that decalcomanias in ceramic colors are eo nomine designations is further buttressed by a headquarters ruling dated November 18, 1976 (CLA–2:R:CV:MC 047512 LCS). In that ruling, the possibility of using ceramic decalcomanias to transfer designs to other than ceramic ware did not prevent the ceramic decalcomanias from being classified in items 273.65 and 723.70, TSUS. Moreover, it was stated that ceramic decalcomanias are susceptible to use in other areas, such as professional decorating, and, occasionally, decoupage on wood.

In sum, the end use of decalcomanias in ceramic colors is unimportant vis-a-vis their tariff classification. Ceramic decalcomanias are classifiable in items 273.65 and 273.70, TSUS, by virtue of the fact that they are printed in ceramic colors, thereby falling within the ambit of these eo nomine provisions.

Holding.—Decalcomanias printed in ceramic colors are classifiable in items 273.65 and 273.70, TSUS, regardless of intended or end use. Decalcomanias not printed in ceramic colors are classifiable in items 273.75 and 273.80, TSUS.

The heat transfer paper in the headquarters decision dated March 23, 1978 (CIS No. 3600–340, Legal Determination 3611–321), is properly classifiable under the provision for other decalcomanias in item 273.75, TSUS, since it is not backed with metal leaf, *and since it is not printed in ceramic colors.* [Italic added.] That the heat transfer paper is "not used in transferring designs to ceramic ware" is immaterial, inasmuch as items 273.65, 273.70, 273.75, and 273.80, TSUS, are eo nomine designations, not end use provisions. The head-

quarters decision dated March 23, 1978 (CIS No. 3600–340, Legal Determination 3611–321), is modified accordingly.

(C.S.D. 79–426)

Vessel Repair: Remissibility of Duty Assessed for Foreign Repairs to Vessel Equipment Covered by Warranty

Date: February 9, 1979
File: VES–13–18–R:CD:C
103366 JL

This ruling concerns a petition requesting relief from the payment of vessel repair duties filed under section 4.14(k) of the Customs Regulations.

Issues.—Are the petition and subsequently filed evidence sufficient to support findings of casualties under 19 U.S.C. 1466?

Facts.—The vessel at issue, the (vessel), an anchor-handling tugboat, was delivered to her owners on November 13, 1973. The engines, 12-cylinder diesel types, were delivered to the shipyard in June 1973, for installation on the vessel. The representative of the owner (name), advised headquarters on March 2, 1978, that the vessel was used from the date of its delivery until its foreign voyage for anchor-handling work in the United States. In May 1974, the foreign voyage during which repairs were effected begun.

Among other things, extensive repairs were made to the starboard main engine during the period from November 11, 1974, until January 8, 1975, in Bremerhaven, Germany. The contract of sale between the owner and thc (seller of engine) dated September 8, 1972 (petitioners' exhibit IIb), states that the warranty period extends from 1 year subsequent to the date of shipment of the powerplant from the supplier. Counsel for the owners, in a letter dated July 14, 1978, states that the vessel departed for North Sea duty on May 20, 1974, "after having been subject to trials and outfitting in and near its home port of New Orleans." Counsel for the owner claims that notwithstanding the time limitation on the manufacturers' warranty, the law of the State of Louisiana imposes an implied warranty of fitness and freedom from defects on a manufacturer which is "extended to such reasonable term as befits the nature of the product and the circumstances of the buyer and seller relative to one another." In short, petitioner claims the engine warranty was in effect when the repairs were effected in Germany even though the breakdown occurred more than 1 year following the date of delivery. (Owner's representative) claims the engine casualty occurred only 2 days beyond the 1-year limitation and

that the manufacturer did afford certain remuneration to (vessel owner) for the repair cost of the casualty. It is claimed that the matter was thus disposed of and legal action to enforce (vessel owner's) position was not necessary. The engine failure is claimed to have been caused by a loss of oil pressure on November 15, 1974, which circumstance was a result of the defect, or defects, in the manufacture and/or installation of the engine, and thus covered under the warranty. The Director, Classification and Value Division, New Orleans Region, recommends remission of vessel repair duties on the starboard engine repairs because, "the work on the starboard engine was begun during the warranty period and appears to have been unforeseeable, * * *."

Winch bolts on the vessel failed on two occasions (February 24 and July 25, 1975) and the Regional Commissioner's office recommends remission of duties because the vessels were being operated during periods of heavy weather.

The repairs outlined in exhibit IV relate to several incidents where the tug apparently collided with other vessels and hit bottom. The Regional Commissioner recommends remission of duty on all repairs in this section.

The Regional Commissioner recommends remission on repairs to the electronic equipment outlined in exhibit III because all items were repaired during the warranty periods.

Invoice V20910 dated August 27, 1975, covers repairs to two vessels and does not identify which engine of the (vessel) was involved. The Regional Commissioner therefore recommends that no remission be allowed on this invoice.

Invoices 922805, 922905, 924805, Y.256, A6548, and 03–042, which are contained in exhibit IIa, pertain to repairs made during the warranty periods to electronic equipment and the Regional Commissioner recommends remission of duty. Invoice 397312 is for the repair of a Marconi converter on which the Regional Commissioner recommends that no duty be remitted because the warranty period was only 90 days and the repair was made beyond the 90th day.

Invoices 023981 and 42556 set out in petitioner's exhibit IIb concerned repairs made on the refrigerator/freezer and air-conditioning units aboard the vessel. Although the petitioner claims that the repairs were performed during the warranty period, the only evidence that petitioner has been able to furnish is a letter dated March 3, 1978, from the company that supplied the air-conditioning system to the vessel. Petitioner claims that the warranty was thrown away at the conclusion of the 1-year period and offers the statement of the company as to the fact that a 1-year warranty against defects of material and workmanship was furnished beginning from the date when the shipyard delivered the vessels to the owner. Petitioner

claims that the manufacturer and distributor of the refrigerator/freezer have terminated operations a number of years ago and it has not been possible to obtain either a copy of the original warranty or any details of the warranty terms. Also, petitioner claims that other companies in the area with similar equipment were unable to provide any useful information on the warranty. The Regional Commissioner would disallow both claimed items because of the lack of evidence of warranty.

Petitioner's exhibit 6 contains a number of invoices, two of which (Nos. 0007 and 0046 of 03–042) concern starboard engine repair items. The Regional Commissioner notes that these items would be allowable if remission is granted on the engine repairs but since they are primarily classification items, remission would not be allowed if the engine items are not allowed.

Law and analysis.—ORR ruling 192–71, abstracted as T.D. 71–83 (38), holds that if satisfactory evidence is furnished clearly showing any part of a vessel to have been repaired and/or serviced just prior to the commencement of a voyage from a U.S. port, it is reasonable to assume that the part is seaworthy for a round voyage, foreign and return. Unless evidence indicates some other reason necessitated the repairs during the voyage, failure of such part within 6 months after the repairs and/or servicing in the United States may be considered a casualty within the meaning of the vessel repair statute, now 19 U.S.C. 1466. However, remission of duty under that statute in these circumstances is limited to duty on the essential, minimum foreign repairs to the part.

ORR ruling 23–69 concerns a petition for relief for repairs made to a VHF telephone system on a vessel on which the Regional Commissioner at New Orleans did not recommend remission because he did not consider the equipment to be "delicate and sensitive," and there was no evidence to indicate that the repairs were the result of a casualty or stress of weather. It was held, among other things, that in the case of a new vessel on its first voyage, it is reasonable to assume new equipment covered by a warranty is seaworthy for a round voyage, foreign and return. Failure of such equipment may be considered a casualty within the meaning of the vessel repair statute but remission is limited to duty on the essential, minimum foreign repairs to the equipment. Further, remission is limited to those specific items which the evidence shows were covered by the warranty and then malfunctioned.

Legal determination 3730–03, discusses the relative weight to be accorded Beaufort scale readings and weather condition descriptions found in ships' logs which would support a finding that a casualty occurred. Conditions of force "8" are not such as would qualify under

19 U.S.C. 1466(b) unless coincidental with descriptions of actual damage observed and/or expositions of waves, rain, sleet, etc.

19 U.S.C. 1466(b) provides in relevant part as follows:

> If the owner or master of such vessel furnishes good and sufficient evidence that:
>
> (1) such vessel, while in the regular course of her voyage, was compelled, by stress of weather or other casualty, to put into such foreign port and purchase such equipments, or make such repairs, to secure the safety and seaworthiness of the vessel to enable her to reach her port of destination; * * * then the Secretary of the Treasury is authorized to remit or refund such duties * * *.

Referring first to petitioner's claim for remission of duty on starboard engine repairs made in Germany, the petitioner must show, in order to prevail, good and conclusive evidence under the statute and administrative rulings that the vessel was new and on its first voyage, that the items repaired were covered by the warranty, and that the equipment was actually "new" within the meaning of ORR ruling 23–69. Regarding the warranty period itself, petitioner admits that the engine broke down 1 year and 2 days subsequent to the date of delivery of the vessel. Even if we were to disregard the best evidence of the warranty which has been offered, which is the copy of the contract between the engine company and the owner which estadlisheb the warranty as beginning on the date that the engines were delivered to the shipyard (which is considerably earlier than 1 year previous to the date that the engine malfunctioned), we are not disposed to accept the opinion of petitioner's counsel that the warranty period could have been extended by operation of law in the State of Louisiana without the submission by the petitioner of a final decree to that effect rendered by a court of competent jurisdiction which tried the dispute between (seller of engine and owner). We note that the tugboat was operated for approximately 6 months in U.S. waters before sailing foreign and for that reason we would not consider the vessel to be "new" within the meaning of ORR ruling 23–69.

Additionally, we do not consider this vessel to have been on its maiden voyage when it departed for the North Sea in 1974 because the tug was operated in U.S. waters for 6 months subsequent to its delivery.

Concerning the winch repairs, we find that remission is not justified because the vessel logs show that the maximum force encountered was eight to nine on the Beaufort scale (three logs) with other incidences of seven to eight (two logs), six to eight (two logs), five to six (one log), and three to four (one log). We also note that the winch bolt failed on two occasions but there was no log submitted for one of the incidents. Further, forces were only three to four on the day that the second

winch failure occurred. Notwithstanding the lack of severity of the winds encountered, it seems clear that the logs do not support a conclusion that the weather conditions were of any appreciable duration. Although the above is dispositive, insofar as the precedent is concerned, it appears from the reading of the engineering report of Mr. X of (an engineering firm) dated August 12, 1975, that the failures at issue were due to faulty design characteristics. We also note from the file that the manufacturer advised Mr. X to tack-weld the heads and fit the bolts with Locktite in order to avoid further failures. For this reason, it appears that the equipment, as delivered, may have been overrated for its intended use aboard the tug.

We agree with the Regional Commissioner's recommendation on the allowance of remission on the electronic repairs which were occasioned by failures of the equipment during the warranty period, and we also agree with his recommendation that remission be allowed on the items in exhibit IV which were caused by collisions and bottom fouling. We agree with his recommendation not to allow remission on repairs to the Marconi converter because the warranty was only 90 days and the malfunction and subsequent repair apparently occurred beyond that period.

Insofar as the repairs to the refrigerator/freezer and the air-conditioning system set out in petitioners' exhibit IIb are concerned, (named) invoice No. 6.078 discloses that the repairs to the air-conditioning unit were accomplished on July 2 and 3, 1974, within 1 year of the warranty outlined in the (named) letter of March 3, 1978, which states that their warranty begins when the shipyard delivers the vessel to the owners. We are disposed to accept the (named) letter as acceptable evidence of the existence of the warranty on the air-conditioning unit and allow remission on that item. However, no evidence has been offered on the warranty in existence for the refrigerator/freezer unit but petitioner states that it is continuing its effort to obtain that warranty, or reasonable evidence of its existence. If acceptable evidence is submitted to the Regional Commissioner, he may accept and allow remission but at the present time "good and sufficient evidence" has not been offered pursuant to the statute.

Before concluding this ruling, we would like to make a comment on one of the reasons given by the Regional Commissioner for his recommendation that remission be allowed on the engine repairs. The element of "unforeseeability" was mentioned in his recommendations. We should like to point out that although the concept of unforeseeability was at one time considered a prime factor in deciding whether or not a casualty had occurred that justified the remission of duty under 19 U.S.C. 1466, we no longer favor the use of that criterion in determining whether or not a casualty has occurred.

Holding.—(1) Duty is not remitted on the cost of repairs to the engine, refrigerator/freezer, Marconi converter, and winch.

(2) Duty is hereby remitted on the cost of repairs to the equipment in exhibit IIa (except the Marconi converter and air-conditioning unit) and electronic equipment set out in exhibit III (with the exception of the engine items), and the repairs set out in exhibit IV caused by collisions and bottom fouling which are held to be casualties.

(C.S.D. 79-427)

Liquidated Damages: Authority of District Director of Customs To Act on Petitions for Relief From Payment of Liquidated Damages

Date: March 13, 1979
File: ENF-4-02-5:R:E:M
608883 JP

REGIONAL COMMISSIONER OF CUSTOMS,
Houston, Tex. 77002.

DEAR SIR: In your memorandum dated April 18, 1978, you requested our comments on the authority of the district director to act on petitions pursuant to section 172.21 of the Customs Regulations (19 CFR 172.21) as qualified by section 172.22 (19 CFR 172.22).

You state that it is the position of the district director of Customs, Houston, that, whenever the claim is $50,000 or less, he has full authority to act under section 172.21, notwithstanding the provisions of section 172.22 which might appear to restrict that authority.

Section 172.21 establishes the authority of the district director to cancel claims for liquidated damages incurred when the claim is $50,000 or less. Section 172.22 specifies special cases on which the district director may act involving demands for liquidated damages. Our interpretation of this provision has been that the district director has authority to act on petitions in these special cases without regard to the amount of the demand for liquidated damages (in other words, even when the amount exceeds $50,000) if he finds a result consistent with that specified in the provision for disposition.

Under paragraphs (a), (b), and (c) of section 172.22, the district director may vary from the guidelines for amounts under $50,000, provided there is justification in the file for such variation. If for amounts exceeding $50,000, he finds a more severe penalty is in order, he must refer the case to headquarters for decision with a recommendation for the higher penalty. Under paragraph (d), the district director must refer all cases regardless of the amount demanded, if he is of the opinion that a penalty amount greater than that provided by paragraph (d) is warranted.

(C.S.D. 79–428)

Classification: Clam Skidder; Feller-Buncher; Delimber-Buncher; Tree-Harvesting Vehicles

Date: April 2, 1979
File: CLA–2:R:CV:MA
053950 E

To: District Director of Customs, Buffalo, N.Y 14202.

From: Director, Classification and Value Division.

Subject: Reconsideration of the tariff classification of certain logging machines. Internal Advice 125/77, Supp. 1.

In your memorandum of July 25, 1978, you request that headquarters reconsider its decision of July 10, 1978,[1] expressing the opinion that certain logging machines identified as the model 21 Logma clam skidder, the model 880 Tree King (previously referred to in error as the model 800), and the model T–310 Logma Delimber-Buncher were classifiable under item 692.16, Tariff Schedules of the United States (TSUS). You express the opinion that the clam skidder should be classified under item 692.30, TSUS, following *The United States* v. *Norman G. Jensen, Inc.*, 64 CCPA 51, C.A.D. 1183 (1977), and that the other two logging machines should be classified under item 666.00, TSUS, as harvesting machines following headquarters letter September 15, 1977 (051711 E).

Facts.—A description of each of the logging machines is set forth in Internal Advice 125/77. They are chiefly used in harvesting logs by persons other than farmers, such as loggers and the lumbering industry. In addition, with respect to the model 21 Logma clam skidder it was stated that that machine had not been shown to be a tractor. The Tree King is a vehicle designed for the felling of trees and bunching them. The delimber-buncher is also a vehicle. It grips trees by the top and delimbs the stems which are then laid out or sorted in bunches on the right of the machine.

Issue.—Are these logging machines classifiable under the provision for motor vehicles specially constructed and equipped to perform special services, other, in item 692.16, TSUS, or is the 21 Logma clam skidder classifiable under the provision for tractors suitable for agricultural use in item 692.30. TSUS, and the other two logging machines classifiable under the provision for harvesting machinery in item 666.00, TSUS.

[1] Published as T.D. 78-417.

Law and analysis.—A. The clam skidder: In C.A.D. 1183, the appellate court held that vehicles, denominated as "Tree Farmer" skidder machines, which were predominantly used to "skid" logs from the site where trees are felled to a landing area for subsequent movement to a saw mill were properly classifiable as tractors suitable for agricultural use in item 692.30, TSUS, and not as tractors, other, in item 692.35, TSUS. The Tree Farmers featured four large wheels, four-wheel drive, articulated design (hinged in the center), weight distribution, logging arch winch, and high ground clearance. It is your view that the clam skidder, which is equipped with a grapple arm called a log loader and a large set of mechanical jaws mounted on the vehicle's chassis in lieu of a logging arch winch, performs the same task and therefore should be similarly classified.

Webster's *New World Dictionary of the American Language* describes a tractor as follows:

> 1. A powerful vehicle with a gasoline or Diesel engine and huge rear wheels or a continuous tread rolling over cogged wheels, used for pulling farm machinery, hauling loads, etc.
> 2. A truck with a driver's cab and no body, designed for hauling one or more large trailers.

This same dictionary defines the term "haul" as follows:

> 1. To pull with force; move by pulling or drawing; tug; drag.

Applying the foregoing definitions to the clam skidder's function and operation, we are satisfied that it meets the definition of a tractor, and since it is used for the same purpose as the Tree Farmer, its tariff status is governed by C.A.D. 1183.

B. The model 880 Tree King and the model T–310 Logma Delimber-Buncher. In I.A. 125/77 these logging machines were found to fulfill the functions of both transportation to a site and operation after arrival, and accordingly within the provision for motor vehicles specially constructed and equipped to perform special services or functions in item 692.16 TSUS, following *The Carrington Co., et al.* v. *United States*, 61 CCPA 77, C.A.D. 1126 (1974). The view was also expressed that even if it could be established that these vehicles were within the provision for harvesting machinery in item 666.00 TSUS, the provision of item 692.16, would more specifically describe them following general interpretative rule 10(c), so as to control classification.

Upon reconsideration we find that no change is warranted in the classification of these vehicles for the following additional reasons:

1. C.A.D. 1183 construed the term "suitable for agricultural use" in item 692.30, and did not involve item 666.00, TSUS.

2. Tariff descriptions of articles are stated in the language in

general usage in the wholesale trade in those articles in the United States. This is the first and most important rule of construction to be applied in tariff classification. *Goat and Sheepskin Import Co.* v. *United States*, 5 CCA 178 (1914). It is presumed that the terms of a tariff description have the same meaning in commerce as in common and popular usage. *Hartmann Truck Co.*, v. *United States*, 27 CCPA 254, C.A.D. 95 (1940). Consulting the lexicographers we find:

> Lumbering is a term applied to the growing and harvesting of the timber products of the forest and their conversion into various sizes and shapes for commercial use. The oldest *industry* in the United States, lumbering comprises a complex and highly competitive number of timber growers, contract loggers, lumber manufacturers, wholesalers, retailers, and commission salesmen. "Encyclopaedia Britannica," volume 14 (1963). [Italic added.]
>
> Logging: Process of harvesting trees, sawing them into appropriate lengths (bucking) and transporting them (skidding) to a sawmill. "Encyclopaedia Britannica Micropaedia," volume VI (1975).
>
> Logging: The occupation of felling trees and cutting them up into logs and transporting the logs to sawmills or to a place of sale. Webster's "Third New International Dictionary" (1971).
>
> Lumbering: The business of cutting or getting timber or logs from the forest for lumber, of processing it for sale, and of marketing it. Webster's "Third New International Dictionary" (1971).
>
> Logging: The process, work, or business of cutting down trees and transporting the logs to sawmills. "The Random House Dictionary of the English Language" (1973).
>
> Lumbering: The trade or business of cutting and preparing timber. "The Random House Dictionary of the English Language" (1973).

It is clear from the foregoing that the harvesting of trees is logging which is a part of the lumbering industry and not within the common meaning of the term "agricultural."

3. The legislative history construing item 666.00, TSUS, discloses an intent to benefit farmers and not others except in the case of horticultural implements which, in the enactment of the Tariff Schedules of the United States, were grouped with agricultural implements because attempts to distinguish between the two produced anomalous results. (See C.I.E. January 1964.)

For example:

Seed cleaning machines intended for use by seed warehousemen and not by farmers, held not agricultural implements. Abs. 44931, 41 Treas. Dec. 542 (1922).

Manure carriers shown to be used exclusively on a farm in connection with stock raising held to be agricultural implements. Abs. No. 23401, 63 Treas. Dec. 1370 (1933).

Scale chiefly used by farmers for feeding cattle held to be an agri-

cultural implement. *Sears, Roebuck & Co.* v. *United States*, 71 Treas. Dec. 972 (1937). Aff'd on rehearing, Abs. 40791.

Celluloid leg bands for poultry chiefly used by farmers and poultry raisers held to be agricultural implements. *United States* v. *S. S. Perry*, 73 Treas. Dec. 243 (1938).

Crusher or stemmer, designed and exclusively employed for crushing grapes in the manufacture of grape juice and juice concentrates, and located and operated on the company ranch or vineyard held not an agricultural implement. Abs. No. 9568, 56 Treas. Dec. 791 (1929). In the course of that decision, the court stated: "Certainly we are not prepared to hold as a matter of law that merely because a manufacturing device or mechanism is installed upon the farm such machine becomes ipso facto an agricultural implement."

Machine used to electronically sort agricultural products such as beans, peas, peanuts, etc. not shown to be within the class or kind of articles that are chiefly used as agricultural implements in the production of food or raiment for man, held not classifiable as an agricultural implement. *Sortex Co., of North America* v. *The United States*, 56 CCPA 41, C.A.D. 951 (1969).

An agricultural implement is "one employed in farming or husbandry, which plays a direct role in the production of food or clothing and is chiefly used for that purpose." *The A. W. Fenton Co.* v. *United States*, 40 Cust. Ct. 327, C.D. 2002 (1958).

A machine for sorting and the sizing of eggs by weight held not to be an agricultural implement. *Staalkt of America, Inc.* v. *The United States*, 56 CCPA 86, C.A.D. 959 (1969). In the course of reaching this decision, the court stated:

> It is our view that the processing of eggs as reflected by this record is clearly preparatory to marketing as a business enterprise related to, but in essence separate and distinct from, the theretofore completed process or pursuit of egg production.

(As applied to this case, logging which begins with the felling of the trees is clearly preparatory to marketing of timber as a business enterprise related to, but in essence separate and distinct from the planting, cultivating, thinning, and growing of trees. This principle was also involved in *National Broiler Marketing Association* v. *United States*, 98 S. Ct. 2122 (1978), which held that the legislative history of the Capper-Volstead Act revealed that Congress did not intend the protection of that act from antitrust laws to extend to the processors and packers to whom farmers sold their goods.)

The provision for harvesting machinery in item 666.00, TSUS, was apparently derived from the provision for harvesting machinery in heading 84.25 of the *Brussels Nomenclature*. In the explanatory notes to that heading, harvesting machines are grouped with hay and grass

mowers, straw and fodder presses, which include harvesting machines for cereals, oil seeds, leguminous vegetables, and so forth, combine harvester-threshers which successively reap, thresh, clean, and bag the the grain, and maize cutters, pickers, and harvesters. There is no indication that harvesting machinery provided for in item 666.00, includes logging machines.

Holding.—1. The model 21 Logma clam skidder is properly classifiable under item 692.30, TSUS. I.A. 125/77 which is published as T.D. 78–417 is modified accordingly.

2. The model 880 Tree King and the model T–310 Logma Delimber-Buncher are properly classifiable under item 692.16. Headquarters letter of September 15, 1977 (051711), which holds that a TJ–30 treelength harvester, a logging machine, may be classifiable under item 666.00, TSUS, if chiefly used on farms in the United States, is inconsistent with this decision and is revoked as to that logging machine.

(C.S.D. 79–429)

Classification: Bags of Unspun Fibrous Vegetable Materials

Date: April 18, 1979
File: CLA–2:R:CV:MA
061107 JPC

To: Area Director of Customs, J.F.K. Airport, Jamaica, N.Y. 11430
From: Director, Classification and Value Division.
Subject: Classification of bags of unspun fibrous vegetable materials. Internal advice No. 29/79.

The merchandise in issue is an oval-shaped Coco Midrib bag with an open weave body (model No. 7213) and a small "disco bag" of bamboo (model No. 7254), from the Philippines.

The body of model No. 7213 measures 9 inches by 8 inches by 4 inches deep. Vegetable fibers are wrapped with thread to make a rigid handle rising approximately 7 inches above the body of the bag.

Model No. 7254 measures 5 inches by 4 inches by 2 inches deep with a twisted cord strap which passes through loops in the top cover of the bag and is tied through loops in the bottom portion of the bag. The natural fibrous material comprising the bab is lacquered.

The issue presented is whether the items are classifiable as baskets or bags of unspun fibrous vegetable materials or handbags of unspun fibrous vegetable materials. If they are baskets or bags, model No. 7213 would be classifiable under the provision for baskets and bags, of unspun fibrous vegetable materials, whether lined or not lined, of rattan or of palm leaf, in item 222.42, Tariff Schedules of the United

States (TSUS). Model No. 7254 would be classifiable under the provision for baskets and bags, of unspun fibrous vegetable materials, whether lined or not lined, of bamboo, in item 222.40, TSUS.

If the items are handbags, model No. 7213 would be classifiable under the provision for luggage and handbags, of unspun fibrous vegetable materials, of rattan or of palm leaf, in item 706.12, TSUS, dutiable at the rate of 25 percent ad valorem. Model No. 7254 would be classifiable under the provision for luggage and handbags, of unspun fibrous vegetable materials, of bamboo, in item 706.10, TSUS, dutiable at the rate of 12.5 percent ad valorem.

Headnote 2(b), part 1, schedule 7, TSUS, provides, "the term *'handbags'* covers pocketbooks, purses, shoulder bags, clutch bags, *and all similar articles*, by whatever name known, customarily carried by women or girls, but not including luggage or flat goods as defined herein or shopping bags" [italic added].

Handbags are used to carry a woman's necessities such as a wallet, keys, cosmetics, eyeglasses, hairpins, pens and pencils, etc. Handbags usually also have some type of closure which will protect the contents of the bag against theft or from falling out. Handbags may also have zippered pockets or open pockets inside or outside or other compartments with or without closures. Handbags have hand and/or shoulder straps. Handbags might have a lining. We have previously ruled a handbag may be as large as 14 inches in height and 12 to 14 inches in width.

Model No. 7254 has a top portion which fits snugly over the bottom portion, completely closing the bag. While it does not have any pockets or compartments, the size of the bag makes them impractical. Its intended use is as a "disco bag" and is meant to be used to carry only a very few items, such as cosmetics, money, identification cards, or keys. The material is a tight weave and would allow nothing to fall out or anyone to see the contents. The strap is long enough to allow the bag to be worn over the shoulder.

Model No. 7213 does not have a closure. The bag has no pockets or compartments. It does not have a strap, but it does have a handle. The size of the bag is 9 inches by 8 inches. The inquirer characterizes model No. 7213 as a basket. As headnote 2(b) states, the item may still be a handbag or a similar article, regardless of what it is called. The bag is of the size, shape, and general appearance of a handbag. If not a handbag, it is a similar article.

Model No. 7254 is classifiable under the provision for luggage and handbags, of unspun fibrous vegetable materials, of bamboo, in item 706.10, TSUS, dutiable at the rate of 12.5 percent ad valorem.

Model No. 7213 is classifiable under the provision for luggage and handbags, of unspun fibrous vegetable materials, of rattan or of palm

leaf, in item 706.12, TSUS, dutiable at the rate of 25 percent ad valorem.

(C.S.D. 79–430)

American Selling Price: Guidelines for Determining Similarity

Date: April 19, 1979
File: CLA–2:R:CV:MA
055441 C

To: Area Director of Customs, New York, N.Y. 10048.
From: Director, Classification and Value Division.
Subject: Request for reconsideration of internal advice request No. 78/78 concerning the applicability of the American selling price basis of valuation to imported field shoes.

Facts.—In internal advice request No. 78/78, this office held that a field shoe, style JTLN 6059 (JTLN 6110 in boys' sizes), is subject to appraisement on the American selling price of the Uniroyal soccer shoe and the Uniroyal field shoe. Since both Uniroyal shoes were found to be equally similar to the imported shoe, the correct American selling price would be the price of the domestic shoe which is closest to the price of the imported shoe.

The imported field shoe is composed of nylon with a vinyl wing-toe, outside counter, and trim. The domestic shoes are made of high-grade plastic.

In our original ruling, we expressed the view that the different material used in the Uniroyal shoes is not sufficient to preclude a finding of similarity.

It is your position that the imported model and the domestic shoes are not legally similar based on the difference in the material of the uppers. You maintain that nylon and vinyl are not essentially similar materials.

You point out that due to the presence of studs, the import, unlike most low-end, athletic-type shoes, will be used almost exclusively in actual sports. This makes the functional differences between a basically nylon shoe and an all-vinyl shoe even more important than usual.

It is your position that due to the different material used in the uppers that the shoes differ markedly in the following respects:

(1) *Breathability.*—The vinyl used is not a poromeric and thus will retain all foot moisture. Nylon (or any other fabric) is the class of material with the most breathability.

(2) *Weight.*—Vinyl is much heavier per square foot than a fabric.

(3) *Abrasion resistance.*—While the import uses some vinyl at wear points to reduce the effect of this difference, the technique does not negate it.

Further, you maintain that the differences in the upper are much more than a question of style or taste, but major factors that a reasonably prudent buyer would weigh in buying an athletic shoe. Thus, you believe that commercial interchangeability is not present.

Issue.—Whether the domestic prototypes are legally similar to the imported model.

Law and analysis.—For the purpose of determining similarity in American selling price cases, four tests have been used as guides:

(1) Similarity of materials;
(2) Commercial interchangeability;
(3) Adaptability to the same use; and
(4) Competitive character.

It is our view that the test for similarity of material has not been met in this instance because nylon and vinyl are not similar materials.

The test for commercial interchangeability has not been met because the domestic shoes are not a viable substitute for the imported model. This is true because the vinyl used in the domestic models is not a poromeric and these models will retain all foot moisture.

For the reasons stated above, it is now our view that the domestically produced Uniroyal soccer shoe and the Uniroyal field shoe are not legally similar to the imported model.

Holding.—The imported field shoe is not subject to appraisement on the American selling price of the claimed domestic prototypes.

(C.S.D. 79–431)

Classification: Clock Movement Portion of Clock-Calculator

Date: June 1, 1979
File: CLA–2:R:CV:MSP
061319 FJD

This request for internal advice concerns the classification of the clock movement portion of a certain clock-calculator (IA 58/79).

Issue.—By measurement of the right-side edge of the pillar plate (the printed circuit board), it is the importer's position that the width of the clock movement is 44 millimeters (approximately 1.76 inches) if the circuit board is considered to be "roughly rectangular" in shape. C.D. 135 was cited, and emphasis was placed on the word "shortest" in the phrase "the width of a movement shall be the shortest surface dimension through the center of the pillar or bottom plate."

It is advised that the clock movement is valued at over $10.

Law and analysis.—In the same paragraph cited by the importer, in C.D. 135, equal emphasis was placed on the word "center" in the phrase "it would seem to follow that the surface dimension through the center of the pillar or bottom plate of the movements in question, measured from one straight side or edge thereof to the other straight side or edge * * * is the proper measurement to be taken."

Headnote 3(d), subpart E, part 2, schedule 7, Tariff Schedules of the United States (TSUS), states that the width of a clock movement is the shortest surface dimension through the center of the pillar or bottom plate, not including in the measurement any portion not essential to the functioning of the movement. Noted in respect to "essential parts" is T.D. 49397, in which the court said, "and included in such measurement (of the width) must be the measurement of all essential parts of such movement."

If the pillar plate (the printed circuit board) used with the clock movement were perfectly rectangular, the width of the movement would be 44 millimeters as the importer contends, because the measurement through the center of the pillar plate would be the same as the measurement made at the right-hand side. The pillar plate is not rectangular; it is an irregularly shaped board. The measurement required to be made to establish the width of this movement is a measurement from the upper right-hand corner of the board, through the center of the board, to the lower left-hand corner. This measurement is greater than 1.77 inches and is the shortest surface dimension that includes all the essential portions of the pillar plate.

Holding.—It is our opinion that the clock movement portion of the clock-calculator is classifiable under the provision for clock movements, assembled, without dials or hands, or with dials or hands whether or not assembled thereon, valued over $10 each, in item 720.18, TSUS, and dutiable at the rate of $1.125 each plus 16 percent ad valorem.

(C.S.D. 79–432)

Classification: Synthetic Sapphire Windows

Date: June 1, 1979
File: CLA–2:R:CV:MSP
061059 TMP

This ruling concerns your request for internal advice, No. 157/78 on the classification of certain synthetic sapphire windows.

Issue.—Whether the synthetic sapphire windows are classifiable under: (a) Item 687.60, Tariff Schedules of the United States (TSUS), dutiable at the rate of 6 percent ad valorem, as parts of photocells;

(b) item 520.75, TSUS, dutiable at the rate of 15 percent ad valorem, as synthetic materials of gemstone quality; or (c) item 540.67, TSUS, dutiable at 25 percent ad valorem, as synthetic optical crystals.

Facts.—The article in question is a synthetic sapphire window which the importer states will be used in photocell devices to pass a wide spectrum of light to the photocell in the infrared wave length. Although the importer uses the sapphire windows he imports in photocells for infrared detectors, it appears from evidence contained in the file that similar sapphire windows are used by companies for various purposes in the optical field and on lamp housings as well as in the infrared range of the light spectrum.

These windows are cut segments of a manmade crystal boule. The window is extremely hard and can be scratched by only a few substances other than itself. The synthetic sapphire material from which these windows were produced is of a quality high enough for use as bearing surfaces. However, in its imported condition, the window is not suitable for such use.

The windows have not been polished or ground to produce optical properties dealing with the visual range of light. An examination of the synthetic sapphire window submitted by the importer as a sample shows, however, that these windows do allow excellent transmission of light in the visual range and do possess the optical property of polarizing light.

Law and analysis.—A. Item 687.60, TSUS, provides for: "Electronic tubes (except X-ray tubes); photocells; transistors and other related electronic crystal components; mounted piezo-electric crystals; all the foregoing and parts thereof * * *." According to general interpretative rule 10(j)i, TSUS, "* * * a provision for 'parts' of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part." The importer claims that these synthetic sapphire windows are dedicated for use in photocells of infrared detectors and are designed for such applications only. He claims that this is their chief use and, therefore, the windows should be classifiable under item 687.60, TSUS, as parts of photocells.

However, evidence contained in the file shows that the synthetic sapphire windows are used by companies working in the infrared range of the light spectrum, the optical field, and on lamp housings, in addition to photocells. There is no evidence that the chief use, as that phrase is defined in general interpretative rule 10(e)(i), TSUS, of the windows is in photocells. General interpretative rule 10(e)(i) states "a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of articles of

that class or kind to which the imported articles belong, and the controlling use is the chief use, i.e., the use which exceeds all other uses (if any) combined." Based upon this requirement, and the evidence presented, the synthetic sapphire windows cannot be classified as "parts" under item 687.60, TSUS.

B. Item 520.75, TSUS, provides for synthetic materials of gem stone quality and articles of such materials, other than those cut, but not set, and suitable for use in the manufacture of jewelry. The windows are cut segments of a manmade crystal boule and, therefore, definitely of a synthetic material. The importer's position is that these windows are not described by the phrase "of gem stone quality" because they are colorless and are not, in their imported condition, suitable for use as jewelry or as bearing surfaces. However, according to the provision, the articles must only be composed of synthetic materials of gem stone quality. In other words, it is the quality of the materials from which the articles were produced that we are concerned with (see T.D. 74–260). Evidence in the file shows that the synthetic material from which the windows are produced is of a quality high enough to be used as bearing surfaces (this is indeed one of the uses for such materials), and that they are translucent and free of visible internal imperfections.

It appears, therefore, that item 520.75, TSUS, does encompass the merchandise in question. Further support of this classification can be found on page 41 of the "Summaries of Trade and Tariffs," in the discussion of items 520.71 and 520.75, TSUS, in the following statement: "Available information indicates that exports (of synthetic gem stone materials and articles thereof) consist largely of * * * fabricated sapphire optical components * * *." Although the importer's argument that a provision for parts prevails over a provision for materials and articles thereof, not specifically provided for elsewhere, is generally correct, this argument has no application in the case at hand since it has been shown that synthetic sapphire windows are not classifiable as "parts" under item 687.60, TSUS.

C. Another argument advanced by your office is that there is a provision of the tariff schedules under which the synthetic sapphire windows are more specifically described than in item 520.75, TSUS. Item 540.67, TSUS, provides for synthetic optical crystals other than in the form of ingots. This item includes synthetic optical crystals in the form of segments of ingots, sheets, or blanks for optical elements. According to the "Modern Dictionary of Electronics," one definition of the noun "blank," when referring to a crystal, is "the result of the final operation on a crystal." On page 34 of the "Summaries of Trade and Tariff" (May 1978), the discussion on synthetic optical crystals contains the following statement: "The finished products [of the syn-

thetic optical crystals] are principally used in infrared and ultraviolet optics, X-ray analysis, and in certain military and space devices." Based on the sample submitted and the evidence presented in the file regarding the use of synthetic sapphire windows, it is your opinion that the windows fall within the above descriptions and are, therefore, encompassed by item 540.67, TSUS, as "synthetic optical crystals in the form of * * * blanks for optical elements."

However, there is no evidence that these items are of the same quality as the ones referred to in the material submitted by your office and that these windows are also used for the optical infrared purposes referred to. Moreover the discussion on synthetic optical crystals on page 34 of the "Summaries of Trade and Tariffs" (May 1978) indicates that the "blanks" encompassed by item 540.67, TSUS, are subsequently optically processed into prisms, lenses, and windows. Based on the importer's submission, this is not done with the synthetic sapphire windows he imports. That is, he uses them, as they are imported, in photocells without further optical processing. It is, therefore, our opinion that these synthetic sapphire windows are not classifiable under item 540.67, TSUS.

Conclusion.—Accordingly, the synthetic sapphire windows in question should be considered "synthetic materials of gem stone quality * * * and articles not specially provided for, of such materials, other than synthetic materials, cut but not set, and suitable for use in the manufacture of jewelry," and as such are dutiable at 15 percent ad valorem pursuant to the provisions of item 520.75, TSUS.

(C.S.D. 79–433)

Vessel Repair: Reporting Procedure for Repairs Performed Abroad to Aircraft

Date: June 13, 1979
File: AIR–4–07–R:CD:C
103980 JM

With your letter dated October 10, 1978, you forwarded a revised reporting procedure for repairs performed abroad to aircraft of (name of airline). We refer to our letters to you dated April 13, 1978, August 1978, and your letter to us enclosing the initial proposed reporting procedure dated June 26, 1978. We regret the delay in responding to your revised proposal.

You have made several revisions to the proposed procedure, most of them apparently in response to our August letter. You have revised the definition of "dutiable repair" to include repairs made with non-U.S.-made material (2.A.) and to include foreseeable repairs required by the

FAA or another U.S. agency. Although these changes bring the procedure's definition of "dutiable repairs" closer to that contained in section 6.7(e) of the Customs Regulations, the definition in the procedure remains deficient. In the interest of expediting this matter we propose that you add the following two paragraphs following 2.A.(3):

> (4) All repairs foreseen prior to departure but not so indicated by entry in the log; or
> (5) All other repairs unforeseen prior to departure but not made necessary by stress of weather or other casualty, or to secure the safety or airworthiness of the aircraft, or to comply with regulations of the FAA or another U.S. agency.

Paragraph (5) essentially restates the remainder of 6.7(e)(1)–(4) not otherwise covered in 2.A. of the procedure. Paragraph (4) is self-explanatory. There is no dispute as to the applicability of section 6.7(e); and TWA has, in fact, instructed its personnel in 5.A(3) of the procedure to refer to section 6.7(e). Accordingly, we hope you will find no basis for disagreement with this addition.

You will recognize that this expanded definition is in conflict with the revised statement contained in 5.A.(2) of the procedure. We would suggest that it is unnecessary and could be omitted. However, if it is your opinion that it remain, it must be qualified by adding at the sentence's end the clause, "except as otherwise provided in 2.A.(5) above."

We note that you have amended 6.D. of the procedure without any recommendation on our part. Your earlier proposal would have had the dutiable repair report submitted with the check covering the duties due. Your latest proposal would have the appropriate Customs form (presumably the "Record of Vessel/Aircraft Foreign Repair or Equipment Purchase," Customs Form 226) submitted with the duties. That modification of the procedure is satisfactory.

Section 6.7(d), Customs Regulations, provides that entry for foreign repairs shall be made on the first arrival of the aircraft in the United States subsequent to repairs made abroad and that entry shall be made as provided by section 4.14, Customs Regulations. Since neither the underlying statute nor the applicable regulation allows the making of a consolidated monthly entry or entry of the repairs at other than the airport of first arrival, the entries for foreign repairs to the aircraft must be made at the airport of first arrival as provided by section 6.7(d) and 4.14, Customs Regulations. Please note that T.D. 79–86, requires Customs Form 226: Record of Vessel/Aircraft Foreign Repair or Equipment Purchase to be used in place of Customs Form 3415: Declaration of Foreign Repairs to Vessels or Aircraft, and Customs Form 7535: Vessel/Aircraft Foreign Repair or Equipment Purchase Entry.

While the original entry for the repairs must be filed at the airport of first arrival, we realize that it is possible that information concerning the foreign repairs will not be available at the time the entry is filed, and we have no objection to filing this information later at the airport where the entry covering the foreign repairs was filed. When submitting such information to supplement the entry, you should furnish the date of first arrival and the aircraft repair entry number.

We note that in 4.B. of your proposed procedure, you have stated that you will continue to stamp the general declaration per existing procedures. We, of course, expect that when you stamp the general declaration to indicate no dutiable repairs were performed abroad that you do so in good faith and not merely as a perfunctory exercise. After stamping the general declaration in good faith to show entry not required by section 6.7(e), Customs Regulations, for equipment purchased or repairs made to an aircraft while in a foreign country, if the airline discovers that dutiable equipment was purchased or repairs made, entry covering the equipment or repairs shall be made at the airport of first arrival at which the general declaration was filed.

(C.S.D. 79–434)

Classification: Double Needle Stitching on Jeans Belt; Ornamentation

Date: June 19, 1979
File: CLA–2:R:CV:MC
055366/055386 MH

This is in response to two requests for internal advice Nos. 147/78 and 155/78, which have been consolidated for purposes of this ruling.

Issue.—Whether double needle stitching along the folded edge of an adjustable tab on denim jeans constitutes ornamentation, for tariff purposes.

Facts.--The only feature at issue is a tab belt which extends about 6 inches across the front opening at the waistband of the instant jeans. The tab contains four rows of contrasting stitching, two at the folded edge and two on the seamed edge.

Law and analysis.—Headnote 3, schedule 3, Tariff Schedules of the United States (TSUS), sets forth the embellishments which may constitute ornamentation for tariff purposes. In order to constitute ornamentation, a feature must serve a primarily utilitarian rather than decorative function. *Blairmoor Knitwear Corp.* v. *United States*, 62 Cust. Ct. 388, C.D. 3396 (1968). The double stitching along the seamed edges is primarily utilitarian in function in that it flattens the outside edge and the seam edges underneath. One row of stitching at

the folded edge is likewise functional in that it serves to retain the crease. It is thus the second row of stitching at the fold which is at issue.

The inquirers claim that the second row on the folded edge adds "needed stiffness so that the tab can go through the buckle easily and withstand stress." A survey of Customs ports has revealed that the instant merchandise has been classified under a uniform and established practice as not ornamented. Accordingly, the instant stitching does not render the garment ornamented, for tariff purposes.

Holding.—The instant stitching does not constitute ornamentation for tariff purposes. Copies of this ruling should be furnished to the inquirers.

(C.S.D. 79–435)

Export Value: Dutiability of Deferred Discount

Date: June 19, 1979
File: R:CV:V JV
061150

To: District Director of Customs, Mobile, Ala. 36601.

From: Director, Classification and Value Division.
Subject: Internal advice request No. 24/79.

This is in reply to a request for internal advice regarding the dutiable status of a discount offered on shipments of cotton—backed PVC vinyl sponge leather from Colombia, appraised under export value, section 402(b), Tariff Act of 1930, as amended, at the invoiced price plus 3 percent.

Issue.—Whether the 3-percent discount is deferred and part of export value or whether it is within the range of usual wholesale quantities (volume discount) and thus freely offered? The basis of appraisement is not in dispute.

Facts.—The record reveals that the discount is granted to wholesalers in the United States on purchases of at least 1 million yards of fabric per year. While the discount is claimed to be freely offered to all purchasers, there are only two companies buying in such quantities. Both U.S. companies are related; however, no relationship exists between the foreign seller and these firms.

Law and analysis.—As you know, deferred discounts are based on sales whose cumulative volume over an elapsed period of time is sufficient to warrant the discount. Because of this cumulative nature, the discount is generally retroactive or "deferred." It has been held repeatedly that a discount allowed on the aggregate of purchases

covering a given period, in other words a deferred discount, is dutiable in that, by its very nature, it is not "freely offered" within the meaning of section 402(b). See *Independent Cordage Co., Inc.* v. *United States*, 63 Cust. Ct. 669, A.R.D. 259 (1969); *F. B. Vandergrift & Co.* v. *United States*, 56 CCPA 105, C.A.D. 962 (1969); and *Joseph A. Paredes & Co., Inc. a/c Andrew D. Darvas Co.* v. *United States*. 69 Cust. Ct. 266, A.R.D. 309 (1972). On the other hand, freely offered discounts, that is, discounts based upon usual wholesale quantities (i.e., volume or quantity discounts) are determined at the time of sale when different prices are in effect dependent upon the quantity ordered in that sale. Although the appraising officer may look to a particular time period in which to find the price range at which the greatest aggregate volume of items is sold, and thereby determine the usual wholesale quantity and the respective discount for appraisement purposes, such volume discounts are granted by the seller at the time of sale because of the volume of that particular sale and not, as in the case with deferred discounts, because of the total volume of all sales over an elapsed period of time.

Accordingly, if it can be demonstrated in the instant case that (1) a sale of over 1 million yards of fabric exists, (2) that this sale constitutes the greatest aggregate volume of sales in the representative period thereby representing the usual wholesale quantity, and (3) that terms of sale are at the invoice price less 3 percent, then this price would be accepted as constituting the appraised value of the merchandise. Conversely, if no sale exists at the stated volume and the discount is granted merely upon a promise by the importer to purchase through numerous sales of over 1 million yards of material during the calendar year, then the discount is deferred and part of dutiable value.

In making such a determination it must first be established whether the "blanket purchase orders," which the inquirer claims confirms the existence of a volume discount, represent sales in the ordinary course of trade or merely promises to buy. The purchase orders cover the years 1975, 1976, and 1978, and are identical in content. The critical factors to note are as follows:

(1) Although the order specifies a quantity of 1 million yards, there is no breakdown of styles or patterns, construction, color, and the quantity to be shipped of each.

(2) Mention is made of subsequent purchase orders which will be "released" at least 30 days prior to shipping, and that those orders will indicate color, print, and embossing. It is implied that no merchandise (except as noted below in item No. 3) is to be shipped until the subsequent purchase orders give the authority to release and specify what is to be shipped.

(3) The order dictates that should the 1 million yardage not be

reached by the 11th month of the year, the balance in style Hippo No. 60 black is to be shipped without further authority.

(4) No price is specified.

(5) Terms of payment are not discussed.

In C.I.E. 1893/57, headquarters determined that merchandise should be treated as sold when a purchaser at wholesale places a firm order with the manufacturer for a certain quantity at a specified price. Later, the Court of Customs and Patent Appeals in *J. L. Wood* v. *United States*, 62 CCPA 25, C.A.D. 1139 (1974) held that for purposes of section 402(b), the term "sale" should be given its ordinary meaning, namely, "transfers of property from one party to another for a consideration." When the above transactions are analyzed in terms of these definitions, it becomes apparent that they do not constitute sales for Customs purposes. Notably lacking are specifications as to the item to be sold, price, and quantity to be shipped.

Finally, the method of effecting payment can often be a guide to the sales transaction. For example, if payment is effected on each subsequent purchase order rather than as a lump sum on the yearly blanket purchase order, it is reasonable to assume that the various payments constitute various sales. In the instant case, however, the available evidence appears to nullify the one sale concept in that the discount is deducted from the monetary transfers effected for each shipment throughout the year.

On the basis of the foregoing, we conclude that the discount in question is deferred in that no sales of over 1 million yards of fabric exist, and that it is granted on this volume based upon numerous cumulative sales over an elapsed period of time.

Holding.—The discount was properly included in the appraised value of the imported merchandise.

(C.S.D. 79–436)

Constructed Value: Double-Knit Women's Suiting and Woven-Wool Women's Suiting; Same General Class or Kind

Date: June 27, 1979
File: R:CV:V RP
541695

This letter is in reference to your memoranda of November 30, 1977, and December 5, 1978, concerning internal advice No. 67/75. After a careful review of your memoranda, we find no arguments which would warrant a reversal of our position.

This office maintains that double-knit women's suiting is not of the

same general class or kind as woven-wool women's suiting. Therefore, the double-knit suiting should be appraised on the basis of constructed value, pursuant to 402(d), Tariff Act of 1930, as amended, represented by the invoice price plus the actual profit that the Irish exporter (name of exporter) appears to have made on its sales to the importer (name of importer). Since there are no other Irish exporters of double-knit women's suiting to the United States, you have argued extensively that constructed value is represented by the invoice price plus the smaller profit percentage realized on sales of merchandise of the "same general class or kind" (i.e., woven-wool women's suiting), which is made by producers in Ireland for shipment to the United States.

In determining questions of "same general class or kind," Customs does not mandate what your November 30, 1977, memorandum describes as an "identity of genus" test but, rather, proceeds on a case-by-case basis examining all the relevant facts and circumstances. It is acknowledged that woven-wool and double-knit fabric are not of the same genus and, that most, if not all of the cases cited in your 1977 memorandum sought to compare species of the same genus. However, distinguishing the facts of the instant case on the above ground from the cases cited was but one of the factors examined in determining that double-knit women's suiting was not of the same general class or kind as woven-wool women's suiting. In examining the totality of circumstances, other factors came into play (see IA 67/75).

As has been stated in previous rulings, Customs has taken a more restrictive view of the term "same general class or kind" than proposed in your memoranda. For example, in your November 30, 1977, memorandum, it is stated that women's suiting is a particular and rather narrow class of fabric and is of the same general class or kind, whether made of woven-wool or double-knit. However, no supporting evidence is provided to distinguish women's suiting from other fabrics. In addition, the statement at page 20 that, "* * * the actual process of converting yarn into fabric whether by knitting or weaving, is far more similar than dissimilar," supports, rather than refutes the argument that all fabrics are of the same general class or kind. Neither the courts nor the Customs Service have interpreted "same general class or kind" so broadly as to include all textile fabrics in one class or kind.

Based on section 402(g) of the Tariff Act of 1930, as amended, your memoranda state that, even if Customs continues to maintain that double-knit women's suiting and woven-wool women's suiting are not of the same general class or kind, the transactions between the importer (name) and exporter (name) must be disregarded, and appraisement made based on the evidence presented. We disagree.

The language of section 402(g) indicates that the appraising officer, when dealing with a related party transaction, may disregard the transaction:

> * * * if in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount *usually* reflected in sales *in the market under consideration* of merchandise of the same general class or kind as the merchandise undergoing appraisement. [Italic added.]

The transaction may not be disregarded solely because the parties are related. See, *United States* v. *Geigy Chemical Corporation*, 523 F. 2d 1400 (C.C.P.A. 1975). In the particular case before us, it is the opinion of this office that the appraising officer used the best evidence available in determining that the profit figure was one that fairly reflected the amount usually reflected in sales in the market under consideration. Since the market under consideration under constructed value is the market *for export to the United States* and, in this particular case, there are no other Irish exporters of double-knit women's suiting to the United States, the actual general expenses and profit of the producer are used for appraisement purposes. *United States* v. *Jovita Perez*, 36 C.C.P.A. 114, C.A.D. 407 (1949).

It should be noted that Customs is not appraising the instant merchandise on the basis of what your December 5, 1978, memorandum describes as a "domestic market value." In I.A. No. 67/75, this office concluded that the second adjustment of prices from (exporter) to (importer) was effected so that the price (exporter) charged (importer) would more closely reflect the prices prevailing for such products and services on the domestic market. In addition, it was stated that this second adjusted price included an amount which represented the actual profit (exporter) realized on its transactions with (importer). Since there are no other Irish exporters of double-knit women's suiting to the United States, the actual profit realized by the producer is used for appraisement purposes.

Although your November 30, 1977, memorandum states that the second adjusted price is designed to maximize companywide after tax profit, headquarters is of the opinion that the reasons underlying the establishment of a particular pricing policy, are legally irrelevant when determining, for constructed value purposes, whether or not a profit figure "fairly reflects the amount usually reflected" under section 402(g) of the Tariff Act of 1930, as amended.

Therefore, we find that the actual profit figures (as evidenced from the second adjusted price) are reflective of that usually reflected, and, that under section 402(g), the appraising officer was within the bounds of his discretionary authority in not disregarding the transaction.

Recent Unpublished Customs Service Decisions

The following listing of recent administrative decisions issued by the Office of Regulations and Rulings, U.S. Customs Service, and not otherwise published, is published for the information of Customs officers and the importing community. Although the decisions are not of sufficient general interest to warrant publication as Treasury decisions, the listing describes the issues involved and is intended to aid Customs officers and concerned members of the public in identifying matters of interest which recently have been considered by the Office of Regulations and Rulings.

A copy of any decision included in this listing, identified by its date and file number, may be obtained in a form appropriate for public distribution upon written request to the Office of Regulations and Rulings, Attention: Legal Reference Area, Room 2404, U.S. Customs Service, 1301 Constitution Avenue NW., Washington, D.C. 20229. These copies will be made available at a cost to the requester of 10 cents per page. However, the Customs Service will waive this charge if the total number of pages copied is 10 or less.

Decisions listed in earlier issues of the CUSTOMS BULLETIN, through July 18, 1979, are available in microfiche format at a cost of $11.10 (15 cents per sheet of fiche). It is anticipated that additions to the microfiche will be made quarterly and subscriptions are available. Requests for the microfiche now available and for subscriptions should be directed to the legal reference area. Subscribers will automatically receive updates as they are issued and will be billed accordingly.

Dated: November 20, 1979.

HARVEY B. FOX,
Acting Director, Office of Regulations and Rulings.

Date of decision	File No.	Issue
10-23-79	104038	Carrier control: Transportation of passengers by foreign vessel between coastwise points in violation of 46 U.S.C. 289

Date of decision	File No.	Issue
10–22–79	104095	Vessels: Whether motor launches built in the United States and used in conjunction with a foreign-built and foreign-registered cruise ship are subject to duty when purchased by an American corporation at an auction in the United States for use in the purchaser's business
11– 2–79	104252	Vessels: Whether a refund of special tonnage tax and light money is warranted when the original vessel register is not shown to Customs officers at the time of entry of the vessel, but a duplicate register is shown to Customs officers at a later date
10–23–79	104299	Vessels: Exemption from payment of special tonnage tax and light money for vessels of the Bahamas, effective February 9, 1979
10–30–79	711345	Entry: Late filing of entry summary due to corrections; time limits
10–22–79	711550	Prohibited and restricted importations: Wildlife products
10–18–79	055563	Generalized system of preferences: Denial of American manufacturer's petition for withdrawal of duty-free entry for disposable butane lighters from Hong Kong
10–30–79	055719	Generalized system of preferences: Whether royalty payments, financial fees, salary and travel expenses for a production manager and technical consultant, and other production costs are direct costs of processing operations
10–11–79	060762	Classification: Whether a fabric is "coated or filled" for tariff purposes (338.30)
10–22–79	060771	Classification: High fructose corn syrup (155.75)
10–26–79	060773	Classification: Tri-n-octyl phosphine oxide (429.95)
10–31–79	061338	Classification: Whether flax material, garnetted and cut, constitutes advanced waste (304.12, 304.18)
10–31–79	061556	Classification: Whether textile loops on the ends of drawstrings on infants' garments are ornamental
10–22–79	062320	Classification: Gloves with plastic clasps (734.99)

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Dated: November 29, 1979.

DONALD W. LEWIS,
Director, Office of
Regulations and Rulings.

Date of decision	File No.	Issue
11- 2-79	104307	Carrier control: Whether a foreign-flag vessel may be used to tow the hulk of a vessel, which is not registered or enrolled under the flag of any nation, between two U.S. ports
11- 8-79	104311	Classification: Yachts, boats, and canoes imported into the United States (696.05, 696.40)
11- 9-79	104335	Carrier control: Use of foreign-registered vessel as a stationary storage vessel for imported foreign liquified petroleum gas
11- 9-79	211027	Foreign trade zone: Whether color television receiver subassemblies imported from Taiwan and entered for consumption are subject to the quantitative restrictions set forth in item 923.79, TSUS, as added by Presidential Proclamation 4634
11- 2-79	711562	Prohibited and restricted importations: Copyrights: Whether a work for hire, prepared for a foreign employer, may be granted an exemption to the manufacturing clause prohibitions even if the employee is an American
11- 5-79	711651	Country-of-origin marking: Orange juice concentrate, consisting of concentrate from Brazil and the United States and packaged in Canada
11- 8-79	711691	Country-of-origin marking: Exemption for circuit boards used in manufacture by ultimate purchaser

Date of decision	File No.	Issue
11- 5-79	061050	American selling price: Woman's open-toe, open-back sandal with jute-covered wedge (700.60)
11- 7-79	061461	American selling price: Woman's open-toe, open-back, slip-on casual shoe with medium wedge and plastic/rubber sole (700.60)
11- 7-79	061470	American selling price: Woman's casual, open-toe, open-back, ankle-strap shoe with medium wedge and woven fabric upper (700.60)
10-22-79	061495	Classification: Motorcross gloves (705.70, 705.35, 735.05)
11- 7-79	061540	American selling price: Woman's casual, open-toe, open-back, ankle-strap shoe with medium wedge and canvas upper (700.60)
11- 9-79	061557	American selling price: Men's casual, closed-toe, closed-back, slip-on shoe with unit molded plastic sole and upper of woven/knit fabric (700.60)
11- 7-79	061699	American selling price: Distinction between sale of polyvinyl chloride and rubber in athletic shoe
11- 7-79	062082	Classification: Roofing materials (494.60, 771.42, 774.60)
11- 5-79	062267	Classification: Soft toy sculptures (737.25, 737.30)
11- 9-79	062372	Classification: Footwear used with roller skates (700.35, 700.45, 734.90)
10-22-79	062461	Classification: Brazing alloy powders (423.96, 618.42)
11- 2-79	062534	Classification: Tote bag (389.62, 706.24)
11- 5-79	062555	Classification: Bicycle headlight (683.80)
11- 5-79	062585	Classification: Ratchet pullers and chain hoists (664.10)
11- 5-79	062606	Classification: Man's casual slip-on shoe (700.60)
11- 5-79	062617	Classification: Nickel-chromium foil (644.22)
10-22-79	062624	Classification: Percussion musical instruments (725.40)
10- 5-79	062629	Classification: Air preheaters (660.15)
11- 5-79	062635	Classification: Marking unit (668.15)
10-22-79	062638	Classification: Sleeve nuts (646.56, 666.00, 923.52)
11- 9-79	062642	Classification: Sandal (700.60)
11- 9-79	062648	Classification: Sandal (700.60)
11- 1-79	062663	Classification: Molded plastic footwear bottom for woman's shoe (770.30, 774.60)
11- 1-79	062681	Classification: Sandal (700.60)
11- 7-79	062687	Classification: Placemats and coasters (220.50, 256.90, 772.35)
11- 7-79	062692	Classification: Timber loaders (664.10, 692.40)
11- 7-79	062693	Classification: Water ski pylon (657.25, 696.15)
11- 5-79	062697	Classification: Golf caps (703.05)
11- 1-79	062701	Classification: Smoke grenades (755.15)
11- 9-79	062706	Classification: Sterling silver miniatures (656.15)
11- 9-79	062733	Classification: Footwear with polypropylene uppers (700.58)
11- 2-79	062789	Classification: Concrete panelmaking machine (678.20)

Decisions of the United States Court of Customs and Patent Appeals

CAD 1237

No. 79–15

ASG INDUSTRIES, INC., PPG INDUSTRIES, INC. LIBBEY-OWENS-FORD COMPANY, AND C E GLASS
v.
THE UNITED STATES

Headnotes

1. BOUNTY OR GRANT UNDER SECTION 303 TARIFF ACT OF 1930—FLOAT GLASS FROM WEST GERMANY.

Customs Court judgment upholding decision of Secretary of the Treasury that float glass manufactured in West Germany did not benefit from payment or bestowal of a bounty or grant within meaning of section 303 of Tariff Act of 1930, as amended (19 U.S.C. 1303), is reversed and remanded for further proceedings.

2. ID.—AD VALOREM SIZE OF BENEFITS.

Government's concession that benefits, paid under regional development programs on manufacture of float glass in West Germany, are not *de minimis* prima facie meets factor of "ad valorem size of benefits" in determining existence of bounty or grant.

3. ID.—LEVEL OF EXPORTS FROM FOREIGN COUNTRY.

Treasury finding that up to 20 percent of said float glass is exported prima facie establishes factor of "level of exports from the foreign country" in determining existence of bounty or grant.

4. ID.—PAYMENTS THAT ARE NOT DE MINIMIS.

In determining existence of bounty or grant, payments that are not *de minimis* presumed to satisfy factor of positive effect or potentially positive effect on exports, particularly when compared to rate of duty on such exports.

5. COUNTERVAILING DUTY WAIVER-OF IMPOSITION OF.

Secretary of the Treasury could waive imposition of a countervailing duty if: (1) Steps were taken to reduce substantially or

eliminate adverse effect of bounty or grant; (2) there was reasonable prospect of trade agreements reducing or eliminating barriers to, or other distortions of, international trade; and (3) imposition of countervailing duty would be likely to seriously jeopardize negotiation of such agreements. 19 U.S.C. 1303(d)(2)(A)—(C).

6. Id.—Congressional Intent.

Congressional intent to tighten administration of countervailing duty law may not be frustrated by simply finding that, for purposes of 19 U.S.C. 1303, there is no bounty or grant through employment of a vague and undefined international trade distortion test.

7. Id.—Discretion of Secretary of Treasury.

Once determined that a bounty or grant is being paid or bestowed, Secretary of the Treasury has not, except for waiver authority, had any discretion to not impose a countervailing duty.

8. Id.—Definition, Grant.

A word of broader significance than "grant" in 19 U.S.C. 1303 could not have been used by Congress.

9. Id.—Injury to U.S. Trade.

In determining whether a bounty or grant was paid upon the manufacture or production of merchandise, an injury to United States trade test may not be employed.

10. Id.—Regional Development Programs.

Benefits bestowed by West Germany upon float glass manufacturers under regional development programs held to be bounties or grants.

11. Id.—Deductions From Actual Payments.

Once it has been determined that a bounty or grant is being paid or bestowed, 19 U.S.C. 1303(a)(1), which provides for a countervailing duty equal to the "net amount of such bounty or grant," implies that certain deductions may be made from the actual payments to calculate the net bounty or grant and that all relevant circumstances are to be taken into account.

12. Id.

The deductions used in arriving at the net amount of the bounty or grant must be established by facts, and mere allegations of the foreign government involved or of the enterprises receiving the bounty or grant are not sufficient.

13. Id.—Domestic Manufacturer.

Domestic manufacturer does not have burden of obtaining evidence of deductions necessary to negate its own prima facie case.

14. Id.—Net Bounty Estimate by Secretary of Treasury.

Under 19 U.S.C. 1303(a)(5), Secretary of Treasury is permitted to estimate the net bounty, and his expertise will play a part in this estimate as long as it rests on a factual basis.

15. Customs Court Scope of Review—Trial De Novo.

A trial *de novo* in this case is the proper scope of review to determine the merits of the issue of the amount of the net bounties or grants.

United States Court of Customs and Patent Appeals, November 29, 1979

Appeal from United States Customs Court, C.D. 4782

[Reversed and Remanded]

Frederick L. Ikenson, Eugene L. Stewart, attorneys of record, for appellants. *Barbara Allen Babcock*, Assistant Attorney General, *David M. Cohen*, Director, *Joseph I. Liebman, John J. Mahon, Sidney N. Weiss* for the United States.

(Oral argument on June 5, 1979 by Frederick L. Ikenson for appellant and by Joseph I. Liebman for appellee)

Before Markey, *Chief Judge*, Rich, Baldwin, and Miller, *Associate Judges*, and Penn, **Judge*.

Miller, Judge.

[1] This is an appeal from the judgment of the U.S. Customs Court, 82 Cust. Ct.——, C.D. 4782 (1979), which upheld the decision of the Secretary of the Treasury ("Secretary") that float glass manufactured in West Germany did not benefit from the payment or bestowal of a bounty or grant within the meaning of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. 1303). We reverse and remand.

BACKGROUND

Appellants, domestic manufacturers and wholesalers of float glass, petitioned the Commissioner of Customs for imposition of a countervailing duty on float glass manufactured in West Germany. They alleged that benefits received by float glass manufacturers in West Germany under various regional development programs, which included low-interest loans and investment subsidies in the form of cash grants and tax credits, were bounties or grants within the countervailing duty law.[1]

The Treasury Department ("Treasury") preliminarily determined [2] that imports of float glass from West Germany benefit from the pay-

*The Honorable John G. Penn, U.S. District Court for the District of Columbia, sitting by designation.

[1] 19 U.S.C. 1303(a) [section 303(a), Tariff Act of 1930, as amended] provides in relevant part:

§ 1303 Countervailing duties—Levy of countervailing duties

(a) (1) Whenever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government, then upon the importation of such article or merchandise into the United States, whether the same shall be imported directly from the country of production or otherwise, and whether such article or merchandise is imported in the same condition as when exported from the country of production or has been changed in condition by remanufacture or otherwise, there shall be levied and paid, in all such cases, in addition to any duties otherwise imposed, a duty equal to the net amount of such bounty or grant, however the same be paid or bestowed.

* * * * * * *

(5) The Secretary shall from time to time ascertain and determine, or estimate, the net amount of each such bounty or grant, and shall declare the net amount so determined or estimated.

[2] In "Notice of Preliminary Countervailing Duty Determination," published in 40 F.R. 27499 (1975).

ment or bestowal of a bounty or grant within the meaning of 19 U.S.C. 1303 by reason of the payments made under the regional development programs. After further study based on additional information, Treasury changed its position[3] giving the following reasons:

> The German Government has advised the Treasury Department that these benefits have the effect of offsetting disadvantages which would discourage industry from moving to and expanding in less prosperous regions. Inasmuch as the recipient glass producers sell a preponderance of their production in the West German home market (not less than 80 percent and up to 99 percent), the level of exports to the United States is a small percentage of the amount exported, and the amount of assistance provided by the regional incentive programs is less than 2 percent of the value of float glass produced, these benefits are not regarded as bounties or grants within the meaning of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. 1303).

Appellants then brought an action in the Customs Court, under 19 U.S.C. 1516(d),[4] contesting this negative countervailing duty determination. Both sides moved for summary judgment. Appellants alleged that the payments are countervailable; the Government contended that appellants failed to establish that the alleged bounties or grants possess the requisite effect upon international trade that is necessary before countervailing duties will be imposed.[5]

The Customs Court

The Customs Court concluded that, although the statutory language is mandatory ("there *shall* be levied"), Congress did not intend "that all assistance given by foreign governments" be considered bounties or grants within the statute, but gave authority to the Secretary to determine whether a bounty or grant has been bestowed, citing *United States* v. *Hammond Lead Products, Inc.*, 58 CCPA 129, C.A.D. 1017, 440 F. 2d 1024, *cert. denied*, 404 U.S. 1005 (1971). It said that the case law provides two tests to be used in countervailing duty determinations: (1) Whether, as a result of governmental programs, exportation of the involved merchandise is encouraged, citing *Downs* v. *United States*, 187 U.S. 496 (1903) (hereinafter "*Downs*"), and *Nicholas & Co.* v. *United States*, 249 U.S. 34 (1919) (hereinafter "*Nicholas*"); (2)

[3] In "Notice of Final Countervailing Duty Determination," published in 41 F.R. 1300 (1976). This notice and the preliminary notice (note 2 *supra*) were signed by the Commissioner of Customs and by the Assistant Secretary of the Treasury (for Enforcement Operations and Tariff Affairs).

[4] 19 U.S.C. 1516(d) provides as follows:

> (d) Within 30 days after a determination by the Secretary—
>
> (1) under sec. 160 of this title, that a class or kind of foreign merchandise is not being, nor likely to be sold in the United States at less than its fair value, or
>
> (2) under sec. 1303 of this title that a bounty or grant is not being paid or bestowed,
>
> an American manufacturer, producer, or wholesaler of merchandise of the same class or kind as that described in such determination may file with the Secretary a written notice of a desire to contest such determination. Upon receipt of such notice the Secretary shall cause publication to be made thereof and of such manufacturer's, producer's, or wholesaler's desire to contest the determination. Within 30 days after such publication, such manufacturer, producer, or wholesaler may commence an action in the United States Customs Court contesting such determination.

[5] The Government concedes that the amount of the benefits received by the foreign manufacturers under the regional development programs is not de minimis.

whether the governmental assistance distorts international trade or discriminates against U.S. sales at home and abroad, citing *Zenith Radio Corp.* v. *United States*, 437 U.S. 443 (1978), *aff'g. United States* v. *Zenith Radio Corp.*, 64 CCPA 130, C.A.D. 1195, 562 F. 2d 1209 (1977).[6] Because only up to 20 percent of the float glass manufactured by the participants in the regional development programs was sold outside the West German home market, and because the ad valorem size of the assistance provided by these programs was less than 2 percent of the value of the float glass produced, the Customs Court found that, although such assistance was more than *de minimis*, "the *bounties* do not appear to have induced the sale of merchandise in such quantities or value *as would tend to distort international trade.*" [Italic added.] The Customs Court cited trade statistics showing increases in the U.S. production and exports (expecially to West Germany) of float glass, and decreases in importations of West German float glass, for support of the Secretary's decision to not impose countervailing duties. Having determined that appellants "failed to overcome the presumption of correctness attaching to the action of the Secretary," [7] the Customs Court denied appellants' motion and granted the Government's motion for summary judgment.

OPINION

Essentially, appellants argue that, since the countervailing duty statute is mandatory, once the Secretary has determined that foreign manufacturers are receiving any benefit from their government, a countervailing duty must be imposed. The Government, agreeing with the Customs Court, argues that the legislative history and case law show that Congress intended countervailing duties to be imposed only against those programs and actions of a foreign government that have been shown to distort international trade and that the following factors involved in international trade distortion must be considered in determining the existence of a bounty or grant: (1) The ad valorem size of the benefits; (2) the level of exports from the foreign country of goods receiving the benefits; and (3) whether the benefit programs had a positive effect on these exports.

[2] With respect to the ad valorem size of the benefits, the Government's concession that the benefits under the regional development programs are not *de minimus* establishes, prima facie, that this factor is met. **[3]** The finding by Treasury that up to 20 percent of the goods are exported likewise establishes that the sceond factor is met.[8] As to

[6] We find no support whatsoever in *Zenith* for a trade distortion test. The Supreme Court did not use the phrase "trade distortion" in its opinion, and the presence or absence of such a factor was not relied upon as a basis for its decision.

[7] 28 U.S.C. 2635(a) provides:

In any matter in the Customs Court:

(a) The decision of the Secretary of the Treasury, or his delegate, is presumed to be correct. The burden to prove otherwise shall rest upon the party challenging a decision.

[8] Treasury set forth no basis for its finding that "the level of exports to the United States is a small percentage of the amount exported."

whether the benefit programs had a positive effect on exports, [4] Treasury's finding that "the amount of assistance provided by the regional incentive programs is less than 2 percent of the value of float glass produced" does not, without more, overcome a presumption that such benefits had a positive effect, or would have a potentially positive effect, on exports, partciularly when compared to the average ad valorem rate of duty of 8.2 percent during the year involved (1974), as pointed out by appellant. *See* 42 Fed. Reg. 23146–47 (1977), where Treasury determined that "bounties or grants were being paid or bestowed, directly or indirectly on exports of certain fasterners (nuts, bolts, and cap screws) from Japan," the benefits being 0.20 percent ad valorem. It said that, ordinarily, benefits of this size might be considered *de minimis* in relation to the value of the merchandise, but that they were "significant" when compared to the regular duty rate (up to 0.75 percent on an ad valorem basis.) *See also* 42 Fed. Reg. 28531 (1977) (aggregate benefits of eight-tenths of 1 percent under a preferential loan program were greater than *de minimis* and it was, therefore, determined that the involved goods received bounties or grants within the meaning of section 303 of the Tariff Act of 1930, as amended).

By section 331(a) of the Trade Act of 1974, Public Law No. 93–618, 88 Stat. 1978 (1975), Congress amended section 303 of the Tariff Act of 1930. Under new section 303(d) (19 U.S.C. 1303(d) (Supp. V 1975)),[9] which was added by this amendment, [5] the Secretary could *waive imposition* [10] of a countervailing duty *if*: (1) steps were taken to reduce substantially or eliminate the adverse effect of the bounty or grant; (2) there was reasonable prospect of trade agreements reducing or eliminating barriers to, or other distortions of, international trade; *and* (3) imposition of a countervailing duty would be likely to seriously

[9] 19. U.S.C. 1303(d) (Supp. V 1975) reads as follows:

(d) *Temporary provision while negotiations are in progress.*

(1) It is the sense of the Congress that the President, to the extent practicable and consistent with U.S. interest, seek through negotiations the establishment of internationally agreed rules and procedures governing the use of subsidies (and other export incentives) and the application of countervailing duties.

(2) If, after seeking information and advice from such agencies as he may deem appropriate, the Secretary of the Treasury determines, at any time during the 4-year period beginning on January 3, 1975, that—

(A) adequate steps have been taken to reduce substantially or eliminate during such period the adverse effect of a bounty or grant which he has determined is being paid or bestowed with respect to any article or merchandise;

(B) there is a reasonable prospect that, under sec. 2112 of this title, successful trade agreements will be entered into with foreign countries or instrumentalities providing for the reduction or elimination of barriers to or other distortions of international trade; and

(C) the imposition of the additional duty under this section with respect to such article or merchandise would be likely to seriously jeopardize the satisfactory completion of such negotiations;

the imposition of the additional duty under this section with respect to such article or merchandise shall not be required during the remainder of such 4-year period. This paragraph shall not apply with respect to any case involving nonrubber footwear pending on Jan. 3, 1975, until and unless agreements which temporize imports of nonrubber footwear become effective.

(3) The determination of the Secretary under paragraph (2) may be revoked by him, in his discretion, at any time, and any determination made under such paragraph shall be revoked whenever the basis supporting such determination no longer exists. The additional duty provided under this section shall apply with respect to any affected articles or merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of any revocation under this subsection in the Federal Register.

[10] The Secretary's authority to waive imposition of countervailing duties was extended to July 26, 1979 (date of enactment of the Trade Agreements Act of 1979, Public Law No. 96-39), retroactive to Jan. 3, 1979, when the previous waiver authority expired. Public Law No. 96-6, 93 Stat. 10 (1979).

jeopardize the negotiation of such agreements. 19 U.S.C. 1303(d)(2)(A)—(C).

During consideration of the bill (H.R. 10710) that became the Trade Act of 1974, it was made clear that all three conditions must be met before the Secretary could waive application of a countervailing duty, and it was emphasized that "either the bounty or grant or its adverse effect must be eliminated (or substantially reduced) before the Secretary would have authority to waive the imposition of a countervailing duty order during trade negotiations." It was explained that the amendments to the countervailing duty law "are designed to tighten the administration" of that law. S. Rep. No. 93–1298, 93d Cong., 2d sess. 185 and 187, *reprinted* in [1974] U.S. Code Cong. & Ad. News 7320 and 7322. To permit the [6] Secretary to avoid using his waiver authority (and to avoid having to find that a more than *de minimis* bounty or grant or its adverse effect has been eliminated or substantially reduced) by simply finding that, for purposes of 19 U.S.C. 1303, there is no bounty or grant through employment of a vague and "undefined" (to use the dissenting opinion's term) international trade distortion test would effectively frustrate the congressional intent to *tighten* administration of the countervailing duty law.

Congress also made clear its understanding that "the present (countervailing duty) statute is mandatory in terms." H.R. Rep. No. 93–571, 93d Cong., 1st sess. 73 (1973). This demonstrates that, [7] except for the waiver provision in the 1974 act, the Secretary has not had any discretion to not impose a countervailing duty once it has been determined that a bounty or grant is being paid or bestowed. *American Express Co.* v. *United States*, 60 CCPA 86, 93, 472 F. 2d 1050, 1056 (1973). Also, by including a requirement that the Secretary reach a final countervailing duty determination within 1 year of the filing of a petition (19 U.S.C. 1303(a)(4)), Congress indicated its intent to put an end to Treasury Department practice calculated "to stretch out or even shelve countervailing duty investigations for reasons which have nothing to do with the clear and mandatory nature of the countervailing duty law." S. Rep. No. 93–1298, *supra* at 183, *reprinted in* [1974] U.S. Code Cong. & Ad. News, *supra* at 7318. To permit the Secretary to place a narrow or restricted interpretation on "bounty" or "grant" as a basis for a negative countervailing duty determination would clearly frustrate the congressional purpose of "assuring effective protection of domestic interests from foreign subsidies * * *." *Id.* Further, it would be inconsistent with the broad meaning of "grant" long ago established by the Supreme Court in *Nicholas & Co.* v. *United States*, *supra* at 39:

> [8] If the word "bounty" has a limited sense the word "grant" has not. A word of broader significance than "grant" could not

have been used. Like its synonyms "give" and "bestow," it expresses a concession, the conferring of something by one person upon another.

Despite a clear expression of congressional intent that an injury test not be employed, the Secretary impliedly injected one into this case, finding that "the level of exports to the United States is a small percentage of the amount exported, and the amount of assistance * * * is less than 2 percent of the value of float glass produced * * *." [11] The Senate-House conference report on H.R. 10710 declares that the waiver provision "is not to be construed as the intent of Congress [to] * * * inject an injury concept into countervailing duty cases regarding durable goods * * *." Conf. Rept. No. 93–1644, 93d Cong., 2d Sess. 45, *reprinted in* [1974] U.S. Code Cong. & Ad. News, *supra* at 7390. Moreover, the Senate report on H.R. 10710 states: "Section 303 of the 1930 Tariff Act does not provide for an injury test." S. Rept. No. 93–1298, *supra* at 185, *reprinted in* [1974] U.S. Code Cong. & Ad. News, *supra* at 7320.[12]

Accordingly, we conclude that it [9] was error to employ an injury (to U.S. trade) test in determining whether a bounty or grant was paid upon the manufacture or production of the involved merchandise. [10] Also, we hold that, for purposes of the countervailing duty law, the benefits (as analyzed above) bestowed by West Germany upon float glass manufacturers under the regional development programs were bounties or grants.[13]

At the same time, it must also be pointed out that appellants' proposed test (any benefit, that is not *de minimis*, bestowed by a foreign government in connection with the production of merchandise requires a countervailing duty) ignores the clear wording of the statute. [11] Once it has been determined that a bounty or grant is being paid or bestowed, 19 U.S.C. 1303(a)(1) provides that "there shall be levied * * * a duty equal to the *net amount* of such bounty or grant." [*Italic* supplied]. Such language implies that certain deductions may be made from the actual payments to calculate the net bounty or grant and that all relevant circumstances are to be taken into account.[14]

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[11] Although, as stated by the Customs Court, the test from *Downs* and *Nicholas* is whether foreign exportation is encouraged, we are dealing here with benefits paid upon "manufacture or production"; whereas, the statute involved in *Downs* and *Nicholas* provided for countervailing duties only on bounties or grants paid upon exportation." Although one test for determining whether a bounty has been paid on *exportation* is whether exportation is encouraged, this is clearly not the only test that may be used in countervailing duty determinations, because the statute has been broadened to cover bounties paid upon manufacture and production as well as bounties paid upon exportation.

[12] The United States, under a grandfather clause, is exempt from the injury requirement under the General Agreement on Tariffs and Trade.

[13] The Customs Court said "it would appear that bounties or grants were bestowed on the production of float glass in the Federal Republic of Germany."

[14] Congress reiterated this "net amount" concept in the legislative history of the extension of the waiver provision (note 9, *supra*):

> The countervailing duty, which is imposed in addition to regular duties, is equal to the *net amount* of the bounty or grant and is intended to offset the *advantage* afforded by the foreign subsidy practice. [Italic added.[

S. Rept. No. 96–45, 96th Cong., 1st sess. 2, *reprinted in* [May 1979] U.S. Code Cong. & Ad. News No. 3, 488, 489.

We note that earlier court opinions have not been precise in distinguishing between "bounty or grant" and "net amount of each bounty or grant." Nevertheless, a difference has been implicit from the opinions. In *Zenith*, although the Supreme Court held that Japan was not conferring a bounty or grant, the Court actually determined that there was no net bounty or grant upon which countervailing duties could be imposed. The Court stated, 437 U.S. at 452–53, that:

> * * * the 1897 statute did provide for levying of duties equal to the *"net amount" of any export bounty or grant.* And the legislative history suggests that this language, in addition to establishing a responsive mechanism for determining the appropriate amount of countervailing duty, was intended to incorporate the prior rule that *nonexcessive remission* of indirect taxes would not trigger the countervailing requirement at all. [Italic added.]

The Court clearly indicated that an *excessive* remission of tax would give rise to a bounty or grant.[15]

Although the Secretary apparently made a feeble attempt to calculate the amount of the net bounty or grant involved here, the statement that "[t]he German Government has advised the Treasury Department that these benefits have the effect of offsetting disadvantages which would discourage industry from moving to an expanding in less prosperous regions" is totally inadequate. If a *factual basis* were shown for such an assertion, it might be concluded that no net bounty or grant was involved. However, contrary to the dissenting opinion, the statement that Treasury was "advised" is hardly a factual basis supporting the conclusion that there was no bounty or grant. *See Yale University* v. *Department of Commerce*, 65 CCPA 97, 104, 579 F. 2d 626, 632–33 (1977). Once it is established that a foreign manufacturer is receiving payments *such as those here involved* (*not* "every payment," as the dissenting opinion imagines) from its government, a countervailing duty *must*, absent a waiver by the Secretary, be imposed unless, in considering all circumstances surrounding the payment, certain deductions can be established resulting in no net benefit to that manufacturer. **[12]** These deductions must be established by facts [16]—not by mere allegations of the foreign government or of the enterprises receiving the bounty or grant. Needless to say, without an adequate factual record, neither this court nor the Cus-

[15] In *Nicholas* the Court stated that cash payments made on exports were bounties or grants. Therefore, the Court equated the net bounty or grant with the actual bounty or grant. It rejected counsel's argument that the payments were intended to compensate the distillers for costs due to British excises and concluded that costs due to a foreign government's excises could not qualify as a deduction from a bounty or grant to calculate a net amount of the bounty or grant.

[16] **[13]** If the Treasury Department cannot, with its expertise, establish the necessary facts, a countervailing duty must be imposed, although a challenge may be brought later by the importer. Because the importer is in a better position to obtain these facts from the foreign manufacturer, once a prima facie case has been established by evidence that payments *such as those here involved* are being made, the domestic manufacturer should not (contrary to the dissenting opinion) have the burden of obtaining evidence of deductions necessary to negate its own prima facia case. **[14]** Also, we note that under 19 U.S.C. 1303(a)(5), the Secretary is permitted to *estimate* the net bounty (*i.e.*, estimate the necessary deductions), and his expertise will play a part in this estimate as long as there is a factual basis to support it.

toms Court can perform a meaningful judicial review of countervailing duty determinations.

Scope of review

As this court pointed out in *United States* v. *Watson*, No. 79–17, C.A.D. 1230, slip op. at 8 (July 26, 1979), "There are no statutory provisions and no common law doctrines setting forth the nature or scope of the review of countervailing duty assessments in the Customs Court * * *." Eschewing any expression of its views on the merits or propriety of a review *de novo* versus a review on the administrative record, this court said (slip op. at 9):

> Congress having supplied no guidelines or criteria for determining what constitutes a "bounty" and what does not, having made no requirement that the Secretary hold a hearing or make a record for review, or that the Administrative Procedure Act be applied, and having provided no definition of the nature of the judicial review to be conducted in countervailing duty cases, "rational and substantial legal arguments" can be made in support of both review *de novo* and review on the administrative record. * * *

Coincidentally, on the same date of the above opinion, the Congress enacted the Trade Agreements Act of 1979 (Public Law 96–39, 93 Stat. 144, enacted July 26, 1979), which added a new section 516A to the Tariff Act of 1930 in which the scope and standards of judicial review are specified.[17] The Senate Finance Committee report (S. Rept. No. 96–249, 1st Sess. 251–52) [18] accompanying the bill that was enacted (H.R. 4537) discussed the new provisions, which were designed to "clarify the scope and standard of review," as follows:

[17] Section 516A provides, in appropriate part:

(a) Review Of Determination.—

* * * * * * *

(2) Review of Determination on Record.—

(A) In General.—Within 30 days after the date of publication in the Federal Register of—

(i) notice of any determination described in clause (ii) * * * of subparagraph B * * *

* * * * * * *

an interested party who is a party to the proceeding in connection with which the matter arises may commence an action in the United States Customs Court by filing a summons, and within thirty days thereafter a complaint, each with the content and in the form, manner, and style prescribed by the rules of that court, contesting any factual findings or legal conclusions upon which the determination is based.

(B) Reviewable Determinations.—The determinations which may be contested under subparagraph (A) are as follows:

* * * * * * *

(ii) a final negative determination by the Secretary * * * under section 303 * * * of this act.

* * * * * * *

(b) Standards of Review.—

(1) *Remedy*.—The court shall hold unlawful any determination, finding, or conclusion found—

* * * * * * *

(B) in an action brought under para. (2) of subsection (a), to be unsupported by substantial evidence on the record, or otherwise not in accordance with the law.

(2) Record for Review.—

(A) *In general*.—For the purposes of this subsection, the record, unless otherwise stipulated by the parties, shall consist of—

(i) a copy of all information presented to or obtained by the Secretary * * * during the course of the administrative proceeding, including all governmental memoranda pertaining to the case and the record of ex parte meetings required to be kept by sec. 777(a)(3); and

(ii) a copy of the determination, all transcripts or records of conferences or hearings, and all notices published in the Federal Register.

* * * * * * *

[18] *Reprinted in* [August 1979] U.S. Code Cong. & Ad. News No. 6A, 259.

> *Scope and standard of review.*—Section 516A clearly defines the scope and standard of review in suits challenging antidumping and countervailing determinations and orders. Currently, the state of the law in this area is unclear and conflicting.
>
> Subsection (b) of new section 516A sets forth the standard of review for those antidumping and countervailing duty determinations which will now be reviewable. Under present law, determinations by the International Trade Commission have been set aside only where found to be arbitrary or contrary to law. More controversial, however, is the standard to be applied to determinations by the Secretary of the Treasury. The Treasury Department has consistently asserted that antidumping and countervailing duty determinations, unlike traditional value and classification decisions, are not subject to *de novo* review. A reading of the two recent countervailing duty decisions in the Customs Court * * * indicates that some differences of opinion exist with respect to the issue.
>
> Section 516A would remove all doubt on whether *de novo* review is appropriate by excluding *de novo* review from consideration as a standard in antidumping and countervailing duty determinations. *De novo* review is both time-consuming and duplicative. The amendments made by title I of the Trade Agreements Act provide all parties with greater rights of participation at the administrative level and increased access to information upon which the decisions of the administering authority * * * are based. These changes, along with the new requirement for a record of the proceeding, have eliminated any need for *de novo* review.

Under section 1002(b) of the 1979 act, the new provisions have no retroactive effect upon the case before us. However, we note the emphasis placed by the Congress on the fact that the new provisions "have eliminated any need for *de novo* review" by providing "all parties with greater rights of participation at the administrative level" and, further, by providing "increased access to information upon which the decisions of the administering authority * * * are based * * * along with the new requirement for a record of the proceeding * * *." Accordingly, and in furtherance of the administration of justice, we conclude that a [15] trial *de novo* is indicated in this case so that the merits of the issue of the amount of the net bounty herein involved can be fully developed. Our conclusion is reenforced by the action of Congress in providing, in the Trade Act of 1974, the same right to judicial review over negative countervailing duty determinations that had been accorded importers over affirmative countervailing duty determinations.[19] With respect to the latter, this court had made clear that the importer had "the right to bring forward any questions of fact relating to the transaction and have them tested

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[19] *See* Conf. Rep. No. 93-644, 93d Cong., 2d Sess. 45, *reprinted in* [1974] U.S. Code Cong. & Ad. News at 7389.

by the applicable law * * *." *V. Mueller & Co.* v. *United States*, 28 CCPA 249, 257, C.A.D. 152 (1940). In that case and also in *American Express Co.* v. *United States*, 60 CCPA 86, C.A.D. 1087, 472 F. 2d 1050 (1973), a trial *de novo* had been conducted by the Customs Court, and this court indicated no disapproval. *See Camp* v. *Pitts*, 411 U.S. 138, 141–42 (1973) and *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 415 (1971).

In view of all the foregoing, we *reverse* the judgment of the Customs Court and *remand* for further proceedings consistent with this opinion.

MARKEY, Chief Judge, with whom RICH, Judge, joins, dissenting.

With due respect, and recognizing fully the frustration imposed by the absence of a statutory definition of "bounty," I dissent.

The Nature of the Appeal

The case comes to us on appeal from the grant of summary judgment to defendant. Both parties sought summary judgment. Both insist that no fact issue is present. Hence, the sole question before us is whether appellants have established on the present record that the payments here involved constituted a bounty *as a matter of law*. I cannot find in the record of this case a basis in *law* for reversing the judgment of the Customs Court [1] or for disturbing the decision of the Secretary that no bounty was here paid.

Nothing in the state of the law applicable to this case precludes the Secretary's acceptance of another government's advice that its payment merely offset disadvantages of moving. Nor has appellant shown anything to suggest that the advice accepted here was untrue. Absent a clear legal basis, and absent contrary evidence, the courts should avoid even an appearance of directing the Secretary to disregard statements of sovereign foreign governments with which he and our government must deal daily on a wide variety of matters.

The legal posture on appeal might be different if it could be said that appellants had established on the record an excess in the government payment over the foreign manufacturer's costs incurred in meeting his government's goals. If proved, that excess might or might not constitute a bounty. Its absence means there is no support whatever in the present record for the majority's assertion that a bounty was here paid.

The Presumption of Correctness

Lost in the shuffling march of the majority opinion toward a desired result is the statutory presumption of correctness attaching to the Secretary's decision that a bounty was not paid. 28 U.S.C. 2635(a).

[1] It is not necessary that this court agree with the reasoning of the Customs Court. It is a judgment we review.

The statute and the Customs Court's determination that appellants had failed to overcome the presumption are quoted in the background section of the majority opinion, but I search the opinion section in vain for any reference whatever to the presumption, or to the evidence by which appellants overcame it.

Footnote 16 of the majority opinion is the sole reference in the majority opinion to burden-of-proof considerations. It misconstrues appellant's burden, in stating that "the domestic manufacturer should not have the burden of obtaining evidence of deductions necessary to negate its own case." The *statutory* burden is to obtain and submit evidence that the Secretary's decision was incorrect, i.e., in the context of the footnote, that some or all deductions were improper.

The majority opinion necessarily rests on the unstated premise that mere proof of the existence of the payments "here involved"[2] constitutes sufficient evidence to overcome the presumption of correctness. It then proceeds to analyze the Secretary's reasons supporting his decision and finds them wanting.[3] But thereby it shifts, contrary to 28 U.S.C. 2635(a), the burden of proof to the Secretary.

Application and enforcement of the statutory presumption of correctness cannot be escaped by leaping to a judicial analysis of the bases for the Secretary's decision. The Secretary, confronted only by proof that payments had been made, may have been tactically unwise in attempting to justify his decision. If so, that circumstance does not entitle a court to disregard its duty to apply 28 U.S.C. 2635(a).

If the presumption and burden application of 28 U.S.C. 2635(a) means anything, it means that only after a domestic manufacturer has submitted evidence that a payment constituted a bounty; i.e., some evidence that the Secretary's negative decision was incorrect, need the Secretary be required to go forward with evidence in support of his decision. Even then, the ultimate burden of proving the Secretary's decision incorrect remains with the domestic manufacturer. In the present record, I find no evidence submitted by appellants that the payments here involved constituted a bounty, and the majority opinion cites none. Absent that proof, the question of whether the Secretary's bases for his decision would appear adequate to this court is simply not, and should not be, reached.

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[2] There is no magic in the phrase "the payments here involved." Except for their admitted non-*de minimis* nature, they are indistinguishable in law from any other payments. Sec. 303(a) says "Whenever any country * * * shall pay * * * any bounty * * *." The distinction is not in the size or nature of the payment, or in its relation to other payments relating to other products by other countries, but in whether it constitutes a bounty.

[3] The majority opinion's foray into trade distortion analysis is both inappropriate and flawed. There is no precedent or warrant for this court to substitute its judgment for that of the Secretary, by deciding that every non-*de minimis* payment meets factor (1), or that 20-percent exportation in every case meets factor (2), or that a payment amounting to less than 2 percent of the value of product produced must always have a positive effect on exports and thus meets factor (3). No basis exists for a court-created "presumption" of beneficial effects. That the Secretary found a bounty in another case, absent proof of identity of all factors, bears no relation to whether a bounty was here paid.

I agree that American manufacturers carry a burden most heavy and probably unfair. They are faced with a presumption of correctness favoring the Secretary's negative finding, and have limited access to foreign data more readily available to the Secretary and to an importer. But the cure is for Congress to devise. No judge is and none ever truly was, an oracle. That judges do make law, however, argues for reasoned restraint, and for limitation of that institutional imperative to cases of clear necessity. Concerning the design and placement of the present burden of proof, Congress has spoken, leaving no room in this case for the courtroom creativity reflected in the majority opinion.

The Merits

Assuming the existence of a basis for disregarding Congress' placement of the burden of proof, and for thereby opening the door to judicial probing of the Secretary's reasoning in this case, I would nonetheless affirm the judgment below.

Concerning the determination of the existence or nonexistence of a bounty, the Congress unquestionably left to the Secretary the clear discretion to decide.[4] Congress has, moreover, consistently refused to impede or guide that discretion by statutory definition or guidelines to be used in its exercise.[5] Absent violation of the Constitution, or a concern of virtually equal dimension, the courts should not rush in where the people's representatives have refused to tread.[6]

Naked of guidance, and faced with provisions for judicial review, the Secretary has assertedly employed a guideline of his own devising; i.e., the presence or absence of distortions and of barriers to trade caused

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[4] The majority opinion confuses the "mandatory" duty to *impose* duties countervailing a found bounty, with the preliminary, separate, and *discretionary* duty to determine whether a bounty exists.

[5] The majority opinion appears oblivious to the Secretary's discretion to determine what is or is not a bounty or grant. This court has stated, "Congress intent to provide a wide latitude, within which the (Secretary) may determine the existence or nonexistence of a bounty or grant, is clear from the statute itself, and from the congressional refusal to define the words 'bounty,' 'grant' * * * in the statute or anywhere else, for almost 80 years." *United States* v. *Zenith Radio Corp.*, 562 F. 2d 1209, 1216 (CCPA 1977), *aff'd*, 437 U.S. 443 (1978). In reporting the Trade Agreements Act of 1979, Congress acknowledged that, under the provision here at issue, "The Secretary of the Treasury has discretion in determining what is a bounty or a grant." Report of the Committee on Finance of the U.S. Senate on H.R. 4537, S. Rept. No. 96-249, 96th Cong., 1st Sess. 84 (1979). *See also* Berger, *Judicial Review of Countervailing Duty Determinations*, 19 Harv. Int'l. L. J. 593, 604-606 (1978); O'Neill, *United States Countervailing Duty Law: Renewed, Revamped and Revisited—Trade Act of 1974*, 17 B.C. Indust. & Comm. L. Rev. 832, 864 (1976); Butler, *Countervailing Duties and Export Subsidization: A Re-emerging Issue in International Trade*, 9 Va. J. Int'l L. 82, 125 (1969). As this court has repeatedly stated, countervailing duty determinations involve complex economic and foreign policy decisions of a delicate nature, for which the courts are woefully ill-equipped. *United States* v. *Hammond Lead Products, Inc.*, 58 CCPA 129, C.A.D. 1017, 440 F. 2d 1024, *cert. denied*, 404 U.S. 1005 (1971); *United States* v. *Zenith Radio Corp.*, *supra*.

[6] The majority lays store by what it finds to be a general intent of Congress to "tighten" administration of sec. 303(a). But those considerations arise, as the majority opinion elsewhere states, "once it has been determined that a bounty or grant has been paid or bestowed." We are here charged only with reviewing a judgment upholding a determination of the Secretary that no bounty was paid in this case, not with a duty of forcing the Secretary to impose duties when no bounty was determined. Nor are we charged with a duty of somehow guarding against Secretarial chicanery. Nor do I see "adverse effects" as a "narrow or restricted" interpretation of "bounty."

by the challenged payments. Though "distortions" and "barriers" are terms undefined, the Secretary's references to sales of float glass in various locales were apparently meant to show absence of distortion or of erected barriers. The Secretary's approach to the exercise of his discretion is in my view perfectly reasonable.

In all events, the Secretary's approach appears far more reasonable than that set forth in the majority opinion. Reasonableness resides in equating the absence of a bounty with failure of a payment to produce adverse trade effects. The majority opimion's effective equation of every payment to a foreign manufacturer (by a government, person, partnership, association, cartel, or corporation) with a bounty is an approach not recommended by reason. It is creative of chaos. Administrative diplomatic, and judicial channels would be clogged if every payment to every manufacturer were presumptively a bounty and subject to judicial review for its "net" amount, and if that review were available to every manufacturer upon a mere showing that a payment had been made. The law is not, and should not be made, an adversary of common, practical sense.

The majority opinion's discussion of the Secretary's waiver authority, though in my view irrelevant to whether a bounty was here paid, does serve to confirm the absence of reason from the majority opinion's approach. The grant is of authority to waive *imposition* of countervailing duties *after* a bounty is found. It is not a grant of authority to waive the earlier duty to determine whether a bounty exists. Congress's limitation, in section 303(d), of waiver of duties to those situations in which "*the* adverse effect of a bounty" [*italic mine*] is being reduced, seems the clearest congressional recognition that adverse trade effects are *inherent* in the concept of "bounty". No citation of authority is needed for the proposition that Congress does not legislate unnecessarily; and it did not do so here. In section 303(d) it provided that *when* the Secretary found a bounty he could waive the otherwise mandatory duties if "the" adverse effects of the bounty were being or about to be reduced or eliminated. Thus section 303(d) rests, in my view, on a legislative *presumption* that bounties produce trade barriers and adverse effects.

Moreover, if a bounty could exist without adverse effect on international trade, who cares? What would there be to shout about on the international stage? And, absent adverse effects and distortions to be reduced and eliminated, whence the bases for waiver?

It defies reason, in my view, to posit a relationship relevant here between the Secretary's consideration of whether adverse trade effects exist (in determining existence of a bounty) and his consideration of whether those effects are being reduced (in deciding whether to waive

duties). The Secretary's initial consideration of adverse trade effects may result in finding there are none, and a consequent finding that no bounty is being paid. That sequence is not an avoidance of an exercise of the Secretary's waiver authority. The majority opinion's insistence that the Secretary must be prevented from somehow engaging in a charade, i.e., from evading his duty to find a bounty by reliance on an absence of adverse trade effects, and from thereby achieving a surreptitious waiver, is at best inappropriate.

It is true that Congress has not defined "bounty" as "payments distorting trade." Nor has it defined "distortion," or "barriers," or "adverse effects." But that is not to say that Congress has precluded the Secretary from determining absence of a bounty where payments do not distort trade. On the contrary, Congress recognized in section 303(d) that bounties do distort trade.[7]

INJURY

Though the absence of adverse effects on international trade should raise no ruckus on the international stage, payments to those who export to our country can raise deep domestic disturbances. Respecting such payments, congressional response to concerns of American business, though arguably ambivalent, consists of just three main elements: (1) If those payments are determined by the Secretary to be a bounty, he must impose countervailing duties (or waive their imposition in limited circumstances); (2) injury or noninjury to American business shall not be a factor in determining whether a bounty is being paid; and (3) American manufacturers can obtain judicial review of the Secretary's determination that a bounty was not paid.

The majority opinion recognizes that Congress disdained the "injury concept," but, with no authority, and contrary to all legislative history, the majority opinion then converts the rejected concept of injury to domestic business into "injury to U.S. trade".[8] It then accuses the Secretary of "injecting" the latter concept into countervailing duties cases and of erroneously employing "an injury (to U.S. trade) test." The complete answer is, "Certainly!" That is the name of this game. It is precisely the trade relationships of the United

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[7] The majority opinion's approach would place the burden of justifying the exercise of his waiver authority upon the Secretary in an American manufacturer's suit challenging a waiver.

[8] The sole statutory reference to "injury" is: "whether *an industry in the United States* is being or is likely to be injured." 19 U.S.C. 1303(b)(1) [italic mine]. Determinations of domestic injury are limited to duty-free goods and, even then, domestic injury determinations are required only in response to U.S. international obligations. 35 U.S.C. 1301(a)(1).

States with other countries that constitute the *raison d'être* for our countervailing duty laws.[9]

NET AMOUNT

After seeming to reject appellants' assertion that any payment requires a countervailing duty, the majority opinion says that once it is established that a foreign manufacturer is receiving payments such as those here involved from its government, a countervailing duty *must*, absent a waiver by the Secretary, be imposed, unless there is no net benefit.[10] The majority then requires a virtual audit by the Secretary of a foreign manufacturer's operations, to establish whether a payment exceeded the manufacturer's cost (here of moving), and, if so, by how much. If the payment exceeds moving costs, the majority opinion says the excess is the "net amount" of the bounty by which countervailing duties must be measured. The majority opinion would thus insist that a bounty was paid (but no countervailing duties would be imposable) when a payment is equal to or less than the costs of moving. Harkening again to a plea for practicality, I cannot see the value in creating even the potential for requiring investigation of every payment made to a foreign manufacturer: nor can I estimate the hoards of government employees, buildings, and paper supplies, involved in meeting that potential.

Earlier court opinions have not distinguished "bounty" from "net amount" in the manner suggested in the majority opinion because there is no such distinction there. *If* the Secretary finds a bounty, he must calculate or estimate the net in determining the countervailing duty. If there be a payment exceeding expenses, that excess may or may not adversely affect world trade. If it doesn't, there is no bounty. But if there is zero excess, i.e., zero net, "there is also zero bounty", and there is nothing to countervail. In *law*, a payment resulting in *no* net benefit cannot be held a "bounty" countervailable under § 303.[11]

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[9] The majority opinion does not reconcile its recognition that Congress rejected an injury test with its quotation from S. Rept. No. 93-1298, wherein it finds the congressional purpose to be an assurance of "effective protection of domestic interests from foreign subsidies." The majority opinion confuses the underlying basis of countervailing duty law—the distortion of trade which results from certain practices, and *thereby* damages domestic manufacturers—with the congressional intent to relieve complaining domestic manufacturers from the unfair and often insurmountable burden of having to prove direct injury to their business resulting from such trade distortion.

[10] Though the majority opinion refers to payments to a manufacturer "from its government," the statute, and presumably the majority statement, encompasses payments from the many sources listed *supra*.

[11] In *Zenith Radio Corp.* v. *United States*, 437 U.S. 443 (1978) the Court held that remission of a sales tax was not a bounty, there being no excess "remission." The Court was not dealing with a subsidy on production. The majority opinion's recognition that an excess in *Zenith* would have led to a conclusion that a bounty had been paid, however, confirms the absence of any distinction between "bounty" and "net amount of bounty."

Our Government pays millions to American industry, in fostering numerous social programs. If a payment exceeds the manufacturer's cost in carrying out the program, e.g., one of minority enterprise, and the payment had no effect on world trade, it could hardly be deemed a bounty. If the payment did not exceed costs there would be not only no effect on trade but there would be nothing to be countervailed.

CONCLUSION

The majority opinion, having assumed, *sub silentio*, that Congress' provision for countervailing the net amount of a bounty means there must somewhere be a gross bounty, and that the payment here was (as every non-*de minimis* payment would be) a gross bounty, remands the case for a trial to determine whether there was a net payment to be countervailed.[12] In so doing it creates a material fact issue, not raised below, ignoring the fact that this case is here on requests for summary judgment made by both parties below, which presupposes no such issue.

The one clear point in the majority opinion, to me at least, is the view that *all* payments, including the one here, are (at least in gross) bounties, and that proof of payment alone imposes on the Secretary a burden to prove that there is no net amount to be countervailed. That view cuts the Gordian knot of frustration (by defining "bounty" as any non-*de minimis* payment) but it severely restricts the Secretary's discretion to determine whether a "bounty or grant" exists, ignores the statutory presumption of correctness, and would require a trial *de novo* to determine net amount in every suit challenging a negative countervailing duty determination. More importantly, by rejecting the Secretary's right to rest his discretionary bounty determinations on the presence or absence of adverse effects on world trade, the majority opinion opens a ponderous Pandora's box which only Congress or the Supreme Court, after long travail, may close.

Perceiving no reversible error, and because appellants failed to carry their burden of overcoming the statutory presumption of correctness attaching to the Secretary's decision that no bounty was paid, I would affirm the grant of summary judgment to defendant in this case.

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[12] The majority opinion's discussion of scope of review and the admittedly inapplicable Trade Agreement Act of 1979 is of little aid in this case, where the parties have submitted the question as one of law on cross motions for summary judgment, each standing on the record as it exists. I agree that substantive judicial review is impossible without an adequate factual record. But no such record is here required. That appellants chose to stand on the record they made is enough in this case for the court to hold on *that* record, that appellants' burden was not met. Hence, no basis exists for this court's requirement that the parties go back and create a new "adequate factual record."

Congress moved rapidly to provide the Secretary and the courts with the review standards set forth in the Trade Agreement Act of 1979. That happy event does not, however, warrant this court's attempt to keep alive a *de novo* review standard by requiring a trial here, where the matter comes up on summary judgment alone. Moreover that Congress resolved a dispute over whether *de novo* review was proper in countervailing duty cases, does not establish that *de novo* review had earlier been proper. If any implication exists in Congress provision for review in the Trade Agreement Act, it would be that *de novo* review had never been appropriate.

(C.A.D. 1238)

ASG INDUSTRIES, INC., PPG INDUSTRIES, INC., LIBBEY-OWENS-FORD COMPANY, AND C E GLASS *v.* THE UNITED STATES

Headnote

No. 79–16

1. BOUNTY OR GRANT UNDER SECTION 303 TARIFF ACT OF 1930—FLOAT GLASS FROM GREAT BRITAIN

Customs Court judgment which upheld decision of Secretary of the Treasury that float glass manufactured in Great Britain did not benefit from payment or bestowal of a bounty or grant within meaning of section 303 of Tariff Act of 1930, as amended (19 U.S.C. 1303), is reversed and remanded for further proceedings.

U.S. Court of Customs and Patent Appeals, November 29, 1979

Appeal from U.S. Customs Court, C.D. 4788

[Reversed and Remanded.]

Eugene L. Stewart, Frederick L. Ikenson, attorneys of record, for appellants. *Barbara Allen Babcock*, Assistant Attorney General, *David M. Cohen*, Director, *Joseph I. Liebman, John J. Mahon, Sidney N. Weiss* for the United States.

[Oral argument on June 5, 1979 by Frederick L. Ikenson for appellants and by Joseph I. Liebman for appellee.]

Before MARKEY, Chief Judge, RICH, BALDWIN, and MILLER, Associate Judges, and PENN,* Judge.

MILLER, Judge.

[1] This is an appeal from the judgment of the U.S. Customs Court, 82 Cust. Ct.—, C.D. 4788 (1979), which upheld the decision of the Secretary of the Treasury that float glass manufactured in Great Britain did not benefit from the payment or bestowal of a bounty or grant within the meaning of section 303 of the Tariff Act of 1930, as amended (19 U.S.C. 1303). For the same reasons set forth in the opinion in *ASG Industries, Inc.* v. *United States*, No. 79–15, decided concurrently herewith, the judgment of the Customs Court is *reversed* and the case is *remanded* for further proceedings.

MARKEY, Chief Judge, and RICH, Judge, dissent.

*The Honorable John G. Penn, U.S. District Court for the District of Columbia, sitting by designation.

Decisions of the United States Customs Court

Customs Rules Decision

(C.R.D. 79–15)

OVERSEAS MAILMAN, INC. *v.* UNITED STATES

On Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment

Court No. 78–2–00357

[Motions denied.]

(Dated November 20, 1979)

Siegel, Mandell & Davidson (*Stephen M. Zelman* on the brief) for the plaintiff.

Alice Daniel, Acting Assistant Attorney General; *Joseph I. Liebman*, Attorney in Charge, Field Office for Customs Litigation (*Susan Handler-Menahem* on the brief), for the defendant.

FORD, Judge: In this action plaintiff has filed a motion for summary judgment, pursuant to rule 8.2 of the rules of this court, seeking to sustain its claims under item 706.22 or 386.50, Tariff Schedules of the United States. The merchandise consists of cotton denim bags measuring approximately 16¼ inches wide by 17¾ inches long having a drawstring at the top. The bag has 6-inch by 6-inch patch pocket of the same material stitched to the bag as well as a cloth-backed plain plastic patch measuring 1¾ inches by 4 inches which is stitched directly above the pocket. Plaintiff contends the merchandise is properly subject to classification as luggage or handbags under item 706.22. Alternatively, plaintiff contends if the court determines the bags are not ornamented then they are claimed to be properly dutiable as other cotton articles not ornamented as provided for in item 386.50.

Defendant contends there are material issues of fact to be determined and hence the matter is not ripe for summary judgment. Alternatively, defendant cross moves for summary judgment and seeks to overrule the claims and dismiss the action.

There are two issues presented for determination. Is the merchandise luggage or handbags and is it ornamented? The former requires evidence that the merchandise was designed to contain clothing or personal effects during travel as provided in headnote 2(a)(i) of subpart D, part 1 of schedule 7 and has a secure closure. *Adolco Trading Corp.* v. *United States*, 71 Cust. Ct. 145, C.D. 4487 (1973); *Prepac, Inc.* v. *United States*, 78 Cust. Ct. 108, C.D. 4694 (1977). The affidavits submitted by both plaintiff and defendant do not settle this matter satisfactorily.

The question of ornamentation is likewise not satisfactorily settled by the affidavits submitted. The general rule as to whether an article is ornamented is a question of fact to be determined with reference to the particular article before the court. *Colonial Corp. of America* v. *United States*, 62 Cust. Ct. 502, C.D. 3815 (1969).

Plaintiff has alleged in its statement under rule 8.2(b) some 12 facts which are alleged not to be in issue and have been established by the pleadings and affidavits submitted. Defendant in opposition has alleged that issues of fact are involved in 9 of the 12 facts which plaintiff deems are not in issue.

The court is of the opinion that since there are material differences between plaintiff and defendant with respect to the relevant facts defendant should not be summarily cut off to its right to a full trial on the facts. *The American Greiner Electronic, Inc.* v. *United States*, 77 Cust. Ct. 164, C.R.D. 76–9 (1976).

The cross-motions for summary judgment are therefore denied.

Decisions of the United States Customs Court

Abstracts

Abstracted Protest Decisions

DEPARTMENT OF THE TREASURY, *November 26, 1979.*

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned. Although the decisions are not of sufficient general interest to print in full, the summary herein given will be of assistance to customs officials in easily locating cases and tracing important facts.

ROBERT E. CHASEN,
Commissioner of Customs.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/207	Boe, J. November 19, 1979	Hawaiian Independent Refinery	74-9-02332, etc.	Item 475.05 0.125¢ per gal. Item 475.10 0.25¢ per gal.	Not subject to duty under TSUS because it was never imported into U.S.	Hawaiian Independent Refinery v. U.S. (C.D. 4777)	Honolulu Light and heavy gas oil, testing both over and under 25° A.P.I. gravity, manufactured in Foreign Trade Sub-zone 9A, Honolulu, from crude oil having status of non-privileged foreign merchandise

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P79/208	Rao, J. November 20, 1979	The Specialty House, Inc.	78-9-01695	Item 372.70 25¢ per lb. + 32.5%	Item 372.10 30%	Agreed statement of facts	New York 100% acrylic shawls, scarves, etc.; lace
P79/209	Maletz, J. November 20, 1979	DYN Electronics	78-8-01505, etc.	Item 735.20 10%	Item 734.20 5.5%	APF Electronics, Inc. v. U.S. (C.D. 4784)	Los Angeles T.V. game machines
P79/210	Richardson, J. November 21, 1979	Broadway-Hale Stores, Inc.	75-11-02881	10% additional duty for alleged failure to properly mark imports with country of origin under sec. 304, Tariff Act of 1930 (19 U.S.C. § 1304 (1970))	Merchandise not subject to additional 10% duty; properly marked in compliance with sec. 304, *supra*	Agreed statement of facts	Los Angeles Wallets

Decisions of the United States Customs Court

Abstracts

Abstracted Reappraisement Decisions

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/236	Rao, J. November 19, 1979	American Express Company, a/c Bus & Truck Supply Company	R66/2259, etc.	Constructed value	$21,466.80 plus value determined on appraisement of components furnished to Bus and Car Co. without charge by Western Sales, Ltd., less amount of any damage allowed in appraisement, plus or minus any adjustments made on appraisement for components or parts added to or omitted from a particular shipment, and less value of components of U.S. origin	Agreed statement of facts	New Orleans Inter-city passenger buses

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/237	Rao, J. November 19, 1979	American Express Company, a/c Bus & Truck Supply Company	R66/2265, etc.	Constructed value	$21,466.80 plus value determined on appraisement of components furnished to Bus and Car Co. without charge by Western Sales, Ltd., less amount of any damage allowed in appraisement, plus or minus any adjustments made on appraisement for components or parts added to or omitted from a particular shipment, and less value of components of U.S. origin	Agreed statement of facts	New Orleans Inter-city passenger buses
R79/238	Rao, J. November 19, 1979	American Express Company, a/c Bus & Truck Supply Company	R66/2269, etc.	Constructed value	$21,466.80 plus value determined on appraisement of components furnished to Bus and Car Co. without charge by Western Sales, Ltd., less amount of any damage allowed in appraisement, plus or minus any adjustments made on appraisement for components or parts	Agreed statement of facts	New Orleans Inter-city passenger buses

					added to or omitted from a particular shipment, and less value of components of U.S. origin		
R79/239	Rao, J. November 20, 1979	Bus and Truck Supply Co.	76-1-00091, etc.	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	New Orleans Inter-city passenger buses
R79/240	Rao, J. November 20, 1979	Robert M. McCoy, a/c Bus and Truck Supply Co.	75-10-02573	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	Jacksonville (Tampa) Inter-city passenger buses
R79/241	Rao, J. November 20, 1979.	YKK Zipper et al.	74-7-01746, etc.	Constructed value (if exported from Japan prior to 2/1/72) United States value (if exported on or after 2/1/72)	Equal to invoiced unit prices plus 8.5%, net, packed Equal to invoiced unit prices, net, packed	Agreed statement of facts	Los Angeles Zippers and/or zipper parts, classified under item 745.70, 745.72 or 745.74
R79/242	Newman, J. November 20, 1979	Yoshida International Inc. et al.	73-5-01140, etc.	Constructed value (if exported from Japan prior to 2/1/72) United States value (if exported on or after 2/1/72)	Equal to invoiced unit prices plus 8.5%, net, packed Equal to invoiced unit prices, net, packed	Agreed statement of facts	New York; Chicago; Los Angeles Zippers and/or zipper parts, classified under item 745.70, 745.72 or 745.74

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R79/243	Rao, J. November 21, 1979	Bus and Truck Supply Co.	73-1-00077	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	Houston Inter-city passenger buses
R79/244	Rao, J. November 21, 1979	Bus and Truck Supply Co.	75-3-00712, etc.	Export value	Appraised values, less 10% (excluding from 10% deduction the value of any Michelin tires included in appraised values), less value of components of U.S. origin allowed on liquidation	Agreed statement of facts	New Orleans Inter-city passenger buses
R79/245	Rao, J. November 21, 1979	YKK Zipper, Inc.	73-4-00890	Constructed value	Equal to invoiced unit prices plus 8.5%, net, packed	Agreed statement of facts	Chicago; Los Angeles Zippers and/or zipper parts, classified under item 745.70, 745.72 or 745.74
R79/246	Newman, J. November 21, 1979	YKK Zipper, Inc.	73-4-00919	Constructed value (if exported from Japan prior to 2/1/72) United States value (if exported on or after 2/1/72)	Equal to invoiced unit prices plus 8.5%, net, packed Equal to invoiced unit prices, net, packed	Agreed statemen of facts	Chicago; Los Angeles Zipper and/or zipper parts, classified under item 745.70, 745.72 or 745.74

International Trade Commission Notices

Investigations by the U.S. International Trade Commission

DEPARTMENT OF THE TREASURY

The appended notices relating to investigations by the U.S. International Trade Commission are published for the information of Customs Officers and other concerned.

R. E. CHASEN,
Commissioner of Customs.

[AA1921–213]

SUGAR FROM CANADA

Notice of Investigation and Hearing

Having received advice from the Department of the Treasury on November 5, 1979, that sugars and sirups from Canada are being, or are likely to be, sold at less than fair value, the U.S. International Trade Commission, on November 20, 1979, instituted investigation No. AA1921–213 under section 201(a) of the Antidumping Act, 1921, as amended (19 U.S.C. 160(a)), to determine whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States. For purposes of the Treasury Department's determination, "sugars and sirups" means sugars and sirups classified under items 155.20 and 155.30 of the Tariff Schedules of the United States.

Conduct of the investigation under the Trade Agreements Act of 1979.— Under the Antidumping Act, 1921, the Commission is required to notify the Treasury Department of its determination in this investigation not later than 3 months after receiving Treasury's advice, in this case not later than February 5, 1980. However, section 101 of the Trade Agreements Act of 1979 (Public Law 96–39, 93 Stat. 144, July 26, 1979) establishes a new title VII of the Tariff Act of 1930, subtitle B of which contains new antidumping duty provisions, and

305–506—79——11

section 106 of the Trade Agreements Act provides for the repeal of the Antidumping Act, 1921. New title VII of the Tariff Act and repeal of the Antidumping Act will become effective January 1, 1980, if the conditions set forth in sections 2 and 107 of the Trade Agreements Act are fulfilled by January 1, 1980.

Assuming that the new law becomes effective on January 1, 1980, the Commission will be required, under section 102 of the Trade Agreements Act, to terminate this investigation, institute a new investigation under subtitle B of title VII of the Tariff Act, and complete the new investigation within 75 days after January 1, 1980. On the assumption that the new law will become effective on January 1, 1980, the procedures described below will be followed in the present investigation.

Hearing.—A public hearing in connection with the investigation will be held on Wednesday, February 13, 1980, in the Commission's hearing room, U.S. International Trade Commission Building, 701 E Street NW., Washington, D.C. 20436, beginning at 10 a.m., e.s.t. Requests to appear at the public hearing should be filed in writing with the Secretary to the Commission not later than the close of business (5:15 p.m., e.s.t.), February 6, 1980. (If it appears that the antidumping duty provisions of the Trade Agreements Act will not become effective on January 1, 1980, a notice rescheduling the hearing (and related prehearing report and statements) for an earlier date will be issued.)

Prehearing statements.—The Commission will prepare and place on the record by January 25, 1980, a staff report containing preliminary findings of fact. Parties to the investigation will submit to the Commission a prehearing statement not later than February 7, 1980. The content of such statement should include the following:

(a) Exceptions, if any, to the preliminary findings of fact contained in the staff report;

(b) Any additional or proposed alternative findings of fact;

(c) Proposed conclusions of law;

(d) Any other information and arguments which a party believes relevant to the Commission's determination in this investigation; and

(e) A proposed determination for adoption by the Commission.

Collection and confidentiality of information.—Requests for confidential treatment of information submitted to the Commission should be directed to the attention of the Secretary. Requests must conform with the requirements of section 201.6 of the Commission's Rules of Practice and Procedure (19 CFR 201.6).

Information submitted to or gathered by the Commission in conjunction with this proceeding under section 201(a) of the Antidumping Act will be subject to the new antidumping provisions regarding access

to information set forth in new title VII of the Tariff Act after January 1, 1980, if that law becomes effective. Those provisions relate to the collection and retention of information by the Commission and the maintenance of confidentiality or the disclosure of information. The provisions of section 777 of title VII will require the following:

(a) A record of all ex parte meetings between interested parties or persons providing factual information in connection with an investigation and the Commissioners, their staffs, or any person charged with making a final recommendation in an investigation;

(b) Disclosure of nonconfidential information or nonconfidential summaries of confidential information which is not in a form that can be associated with or used to identify the operations of a particular person;

(c) Preventing disclosure of confidential information unless the party submitting the information consents to the disclosure; and

(d) Limited disclosures of certain confidential information under protective order or by an order of the U.S. Customs Court.

Section 516A of the Tariff Act, added by section 1001 of the Trade Agreements Act, will require that all information in the record before the Commission in the title VII investigation, whether confidential or nonconfidential, become part of the record before the U.S. Customs Court in any action under section 516A regarding the Commission's determination. Section 771 of the Tariff Act provides definitions applicable to title VII.

The Commission is prescribing these procedures pursuant to section 335 of the Tariff Act, which authorizes the Commission to adopt such reasonable procedures as are necessary to carry out its functions and duties.

By order of the Commission.

Issued: November 21, 1979.

KENNETH R. MASON,
Secretary.

[303–TA–11]

NONRUBBER FOOTWEAR COMPONENTS FROM INDIA

Notice of Investigation and Hearing

Having received advice from the Department of the Treasury on October 24, 1979, that a bounty or grant is being paid with respect to certain nonrubber footwear components imported from India, entered under item 791.26 of the Tariff Schedules of the United States and accorded duty-free treatment under the generalized system of preferences, the U.S. International Trade Commission, on November 20,

1979, instituted investigation No. 303–TA–11 under section 303 of the Tariff Act of 1930, as amended (19 U.S.C. 1303) (the countervailing duty law), to determine whether an industry in the United States is being or is likely to be injured, or is prevented from being established, by reason of the importation of such merchandise into the United States. Treasury defined the term "certain nonrubber footwear components" to mean leather cut or wholly or partly manufactured into forms or shapes suitable for conversion into footwear, other than patent leather and other than nonpatent leather uppers lasted or otherwise fabricated with midsoles or insoles.

Conduct of the investigation under the Trade Agreements Act of 1979.—Under the countervailing duty law, the Commission is required to notify the Treasury Department of its determination in this investigation not later than 3 months after receiving Treasury's advice, in this case not later than January 24, 1980. However, the countervailing duty law has been amended in part and supplemented in part by sections 101–103 of the Trade Agreements Act of 1979 (Public Law 96–39, 93 Stat. 144, July 26, 1979). Section 101 of the act establishes a new title VII of the Tariff Act (sec. 701, et seq.; 19 U.S.C. 1671, et seq.) providing new (supplemental) countervailing duty provisions. Section 102 treats with investigations pending as of the effective date of the new title VII provisions (January 1, 1980, assuming that certain conditions set forth in secs. 2 and 107 of the Trade Agreements Act are fulfilled as of that date). Section 103 amends the present law (sec. 303 of the Tariff Act) in several specific respects to take into account new title VII of the Tariff Act.

Assuming that the new law becomes effective on January 1, 1980, the Commission will be required, under section 102 of the Trade Agreements Act, to terminate this investigation, institute a new investigation under subtitle A of title VII of the Tariff Act, and complete the new investigation within 75 days after January 1. On the assumption that the new law will become effective on January 1, 1980, the procedures described below will be followed in the present investigation.

Hearing.—A public hearing in connection with the investigation will be held on Monday, February 4, 1980, in the Commission's hearing room, U.S. International Trade Commission Building, 701 E Street NW., Washington, D.C. 20436, beginning at 10 a.m., e.s.t. Requests to appear at the public hearing should be filed in writing with the Secretary to the Commission not later than the close of business (5:15 p.m., e.s.t.), January 28, 1980. (If it appears that the new countervailing duty provisions will not become effective on January 1, 1980, a notice rescheduling the hearing (and related prehearing report and statements) for an earlier date will be issued.)

Prehearing statements.—The Commission will prepare and place on

the record by January 14, 1980, a staff report containing preliminary findings of fact. Parties to the investigation should submit to the Commission a prehearing statement not later than January 24, 1980. The content of such statement should include the following:

(a) Exceptions, if any, to the preliminary findings of fact contained in the staff report;
(b) Any additional or proposed alternative findings of fact;
(c) Proposed conclusions of law;
(d) Any other information and arguments which a party believes relevant to the Commission's determination in this investigation; and
(e) A proposed determination for adoption by the Commission.

Collection and confidentiality of information.—Requests for confidential treatment of information submitted to the Commission should be directed to the attention of the Secretary. Requests must conform to the requirements of section 201.6 of the Commission's "Rules of Practice and Procedure" (19 CFR 201.6).

Information submitted to or gathered by the Commission in conjunction with this proceeding under present section 303 of the Tariff Act will be subject to the new countervailing duty law provisions regarding access to information set forth in new title VII of the Tariff Act after January 1, 1980, if that law becomes effective. Those provisions relate to the collection and retention of information by the Commission and the maintenance of confidentiality or the disclosure of information. The provisions of section 777 of title VII will require the following:

(a) A record of all ex parte meetings between interested parties or persons providing factual information in connection with an investigation and the Commissioners, their staffs, or any person charged with making a final recommendation in an investigation;
(b) Disclosure of nonconfidential information or nonconfidential summaries of confidential information which is not in a form that can be associated with or used to identify the operations of a particular person;
(c) Preventing disclosure of confidential information unless the party submitting the information consents to the disclosure; and
(d) Limited disclosure of certain confidential information under protective order or by an order of the U.S. Customs Court.

Section 516A of the Tariff Act, as amended by the Trade Agreements Act, will require all information in the record before the Commission in the title VII investigation, whether confidential or nonconfidential, to become part of the record before the Customs Court in any review of a Commission determination. Section 771 provides definitions applicable to title VII.

These procedures are set forth pursuant to section 335 of the Tariff

Act, which authorizes the Commission to adopt such reasonable procedures as are necessary to carry out its functions and duties.

By order of the Commission.

Issued: November 21, 1979.

KENNETH R. MASON,
Secretary.

[TA-201-42]

ROSES

Notice of Investigation and Hearing

Investigation instituted.—Following receipt of a petition on November 15, 1979, filed on behalf of Roses Inc., a trade association of the U.S. rose-growing industry, the U.S. International Trade Commission on November 29, 1979, instituted an investigation under section 201(b) of the Trade Act of 1974 to determine whether fresh-cut roses (provided for in item 192.20 of the Tariff Schedules of the United States (TSUS)), are being imported into the United States in such increased quantities as to be a substantial cause of serious injury, or the threat thereof, to the domestic industry producing an article like or directly competitive with the imported article.

Public hearing ordered.—A public hearing in connection with this investigation will be held in the Commission's hearing room, U.S. International Trade Commission Building, 701 E Street NW., Washington, D.C. 20436, beginning at 10 a.m., e.s.t., on Monday, February 25, 1980. Requests for appearances at the hearing should be received in writing by the Secretary of the Commission at his office in Washington, D.C., not later than noon, February 18, 1980.

Inspection of petition.—The petition filed in this case is available for public inspection at the Office of the Secretary, U.S. International Trade Commission and at the New York City office of the U.S. International Trade Commission located at 6 World Trade Center.

By order of the Commission.

Issued: December 3, 1979.

KENNETH R. MASON,
Secretary.

(332-106)

IDENTIFICATION OF CHEMICALS FOR THE NEW TARIFF NOMENCLATURE FOR CERTAIN BENZENOID CHEMICALS

AGENCY: U.S. International Trade Commission.

ACTION: Notice is hereby given that the Commission has made its

preliminary determination pursuant to investigation No. 332–106, instituted June 28, 1979 (44 F.R. 39315), with respect to a list of benzenoid chemicals and products imported into the United States prior to January 1, 1978, or produced in the United States, in commercial quantities, prior to May 1, 1978. The list pertains to chemicals and products which are of a type classified in 1 of 47 "basket" categories, enumerated in the annex to this notice. Chemicals and products which are not on the list and which are classifiable in the 47 "basket" provisions will become eligible (in accordance with concessions negotiated during the MTN) for (1) immediate tariff reductions without staging, (2) accelerated staging, or (3) greater tariff reductions than then remainder of the chemicals and products in the "baskets," under the new tariff nomenclature provided for certain benzenoid chemicals and products in section 223(d) of the Trade Agreement Acts of 1979.

A copy of the list in tabular form can be obtained free of charge from the Commission. The list consists of (1) an alphabetic listing of Chemical Abstracts Service (CAS) names, and (2) a listing in order of CAS registry numbers.

WRITTEN SUBMISSIONS: Interested parties are invited to comment on the Commission's preliminary determination of chemicals and products appearing on the list. Proposals to modify the list must be accompanied by supporting documentation in order that the Commission may evaluate public comments. All public submissions should include at least the following information:

Name of Federal agency of registration of the articles.
Name of the chemical or product as specified in the registration form.
Chemical Abstracts Service (CAS) number, if available.
Month and year of registration with above-named agency.
Month and year that commercial production began or importation occurred.
Item number, from the list of 47 basket categories, listed in the annex to this notice that characterizes the named article.
Certification of the above by a responsible official of the company.

Written comments should be submitted by January 21, 1980.

FOR FURTHER INFORMATION CONTACT: Mr. Ed Cappuccilli, Office of Industries, 202–523–0490, or Mr. Holm Kappler, Office of Nomenclature, Valuation, and Related Activities, 202–523–0365, U.S. International Trade Commission, 701 E Street NW., Washington, D.C. 20436.

SUPPLEMENTARY INFORMATION: The Customs Valuation Code negotiated in the Multilateral Trade Negotiations (MTN), as implemented by section 223(d) of the Trade Agreements Act of 1979, provides for a new tariff nomenclature for benzenoid chemicals and

products with rates of duty adjusted to reflect the adoption by the United States of a revised system of Customs valuation based principally upon transaction value. The Commission has been requested by the Special Representative for Trade Negotiations (STR), at the direction of the President, to prepare a list of those benzenoid chemicals and products imported into the United States prior to January 1, 1978, or produced in the United States in commercial quantities prior to May 1, 1978.

The Commission will provide a final list to the President and the STR not later than March 31, 1980. The list will include not only the CAS names of the chemicals and products but also their commercial names and synonyms.

By order of the Commission.

Issued: November 26, 1979.

KENNETH R. MASON,
Secretary.

ANNEX

Basket categories in the new tariff nomenclature for benzenoid chemicals and products

Item No.:[1]	*Description*
1. 402.52	Other hydrocarbons.
2. 402.80	Other halogenated hydrocarbons.
3. 403.12	Other hydrocarbon derivatives.
4. 403.56	Other alcohols, phenols, etc.
5. 403.64	Other ethers, ether-alcohols, etc.
6. 404.28	Other monocarboxylic acids, etc.
7. 404.36	Other polycarboxylic acids, etc.
8. 404.46	Other carboxylic acids.
9. 404.88	Other amines, etc.
10. 405.08	Other amines having 1 or more oxygen functions, etc.
11. 405.32	Other amides, etc.
12. 405.60	Other nitrile function compounds.
13. 405.68	Other diazo-compounds, etc.
14. 405.80	Other compounds with other nitrogen functions.
15. 406.08	Other organo-inorganic compounds.
16. 406.40	Other heterocyclic compounds.
17. 406.56	Other sulfonamides.
18. 406.61	Other sultones, etc.
19. 407.05	Other acyclic organic chemicals, etc.
20. 408.22	Other herbicides.
21. 408.28	Other insecticides.
22. 408.36	Other pesticides.
23. 409.26	Other textile assistants.
24. 409.66	Other acid dyes.
25. 409.74	Other basic dyes.

[1] These are items in the new tariff nomenclature for benzenoid chemicals and products provided for in sec. 223(d) of the Trade Agreements Act of 1979.

26.	409.82	Other direct dyes.
27.	409.90	Other disperse dyes.
28.	410.00	Other solvent dyes.
29.	410.08	Other reactive dyes.
30.	410.16	Other vat dyes.
31.	410.20	Other dyes.
32.	410.32	Other color lakes and toners, etc.
33.	411.08	Other imidazoline derivatives.
34.	411.40	Other papaverine, etc.
35.	411.48	Other alkaloids.
36.	411.56	Other antihistamines.
37.	411.72	Other penicillin.
38.	411.84	Other anti-infective sulfonamides.
39.	411.94	Other anti-infective agents.
40.	412.02	Other autonomic drugs.
41.	412.10	Other cardiovascular drugs.
42.	412.34	Other antidepressants.
43.	412.38	Other drugs, etc.
44.	412.48	Other hormones.
45.	412.64	Other vitamins.
46.	412.68	Other drugs.
47.	413.28	Other aromatic compounds, etc.

In the Matter of
CERTAIN ROTATABLE PHOTOGRAPH AND CARD DISPLAY UNITS, AND COMPONENTS THEREOF

Investigation No. 337-TA-74

Order No. 1

Pursuant to my authority as Chief Administrative Law Judge of this Commission, I hereby designate Administrative Law Judge Donald K. Duvall as presiding officer in this investigation.

The Secretary shall serve a copy of this order upon all parties of record and shall publish it in the Federal Register.

Issued: November 29, 1979.

DONALD K. DUVALL,
Chief Administrative Law Judge.

(225-1)

COMPETITIVE STATUS OF CERTAIN BENZENOID CHEMICAL IMPORTS FROM SWITZERLAND AND THE EUROPEAN COMMUNITY

AGENCY: U.S. International Trade Commission.

CORRECTION: In Federal Register document 79-35280 appearing

on page 66082 of the issue of Friday, November 16, 1979, a portion of the annex was omitted. The mission portion of the annex appears below.

By order of the Commission.

Issued: November 20, 1979.

KENNETH R. MASON,
Secretary.

ANNEX

Chemicals or products which were not valued on the basis of American selling price and for which a more appropriate and representative rate of duty exists in section 223 of the Trade Agreements Act of 1979—Continued

Chemical name/product	Representative period (month/year)	TSUS item No. and col. 1 rate of duty in sec. 223			
		Existing rate		More appropriate rate	
		TSUS item	Rate (percent)	TSUS item	Rate (percent)
2-Hydroxybenzoxazole (benzoxazolone).	Feb. 1977 to Feb. 1978	406.40	1.7¢/lb +16.2%	406.36	1.7¢/lb +12.4%
o-((3-(Hydroxymercuri)-2-methoxypropyl) carbamoyl) phenoxyacetic acid (mersalyl acid).	Aug. 1977 to Aug. 1978	405.32	1.7¢/lb +18.1%	405.28	Do.
3-Methyl-1-(p-tolyl)-2-pyrazoline-5-one (p-tolyl methyl pyrazolone).	Nov. 1977 to Nov. 1978	406.40	1.7¢/lb +16.2%	406.36	Do.
Naphthalene trisulfonic acid (1,3,6 and 1,3,7).	July 1976 to July 1977	403.12	1.7¢/lb +15.9%	403.09	1.7¢/lb +12.5%
4-Phenylmorpholine	Nov. 1977 to Nov. 1978	406.40	1.7¢/lb +16.2%	406.36	1.7¢/lb +12.4%
Propanolol hydrochloride	do	412.02	1.7¢/lb +19.9%	411.98	1.7¢/lb +13.0%
beta-Resorcylamide	Mar. 1977 to Mar. 1978	405.32	1.7¢/lb +18.1%	405.28	1.7¢/lb +12.4%
Toluene-2,5-diamine sulfate	Sept. 1977 to Sept. 1978	404.88	1.7¢/lb +18.8%	404.84	Do.

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